83-1040

No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEABOARD SYSTEM RAILROAD, INC., *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 1983

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QUESTIONS PRESENTED

1. Whether, since this Court twice reviewed on the merits District Court decisions determining threshold legal claims under the Black Lung Benefits Act (see p. 8, below), the Sixth Circuit erred in holding that the District Court lacked jurisdiction to entertain such claims.

2. Whether, since Congress explicitly said in the legislative history (see p. 5, below) that the term "miners" does not include "those workers employed by a railroad" where the railroad does not operate the mine, the Secretary of Labor exceeded his statutory authority in construing the term "miners" to include the employees of such railroads.[1]

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[1] If this petition is granted, the railroads will also brief their related contention that railroads are also not "operators" within the meaning of the statute and railroad facilities do not constitute mines. However, these alternative bases for reaching the same result are not discussed in this petition, because the conflict respecting "miner" is so direct.

PARTIES BELOW

Parties in the court below were as follows: In addition to the Secretary of Labor, the appellants were the Secretary of Health and Human Services and the Secretary of the Treasury. In addition to the Louisville and Nashville Railroad Company, the appellees were the Alabama Great Southern Railroad Company; the Baltimore and Ohio Railroad Company; the Chesapeake and Ohio Railway Company; the Cincinnati, New Orleans & Texas Pacific Railroad Co.; the Clinchfield Railroad; the Illinois Central Gulf Railroad Company; the Interstate Railroad Company; the Missouri Pacific Railroad Company; the New River Railroad Company; the Norfolk and Western Railway Company; the Norfolk Southern Railway Company; Richard B. Ogilvie, Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor; the Southern Railway Company; and the Union Pacific Railroad.

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Petitioners ("the railroads") request certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. A list of the petitioners appears as Appendix A. The list of parents, subsidiaries, and affiliates required by Sup. Ct. R. 28.1 appears as Appendix I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 713 F.2d 1243 and appears as Appendix B. The opinion of the District Court, which is unreported, appears as Appendix D.

JURISDICTION

The decision of the Court of Appeals, which constitutes its judgment, was filed on August 12, 1983. Pet. App. 2a.

A timely-filed petition for rehearing was denied on September 28, 1983, by an order that appears as Appendix C.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 402(d) of the Black Lung Benefits Act, 30 U.S.C. § 902(d), as amended, and Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921, as amended, appear in Appendix G. The Department of Labor's Transmittal No. 81-3 appears as Appendix H.

STATEMENT OF FACTS

This case presents two related federal questions of continuing importance. The jurisdictional issue is whether a District Court has jurisdiction (as this Court has twice assumed it did) to review legal determinations of the Secretary of Labor as to the scope of the statute governing "black lung" benefits. On the merits, the issue is whether the Secretary of Labor erred in interpreting the statute to include railroad employees as "miners" despite an express Congressional direction not to do so.

A. The Governing Legislation and the Secretary of Labor's Administrative Determination in This Case

The legislation now known generically as the Black Lung Benefits Act ("BLBA") originated in 1969 as Title IV of a major new statute designed to improve the health and safety of coal miners.[2] The stated purpose of Title IV

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[1] A subsequent request for permission to file a suggestion of rehearing *en banc* out of time was denied on September 13, 1983, without formal order. See Pet. App. 13a

[2] Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742. Title IV, as amended, is now codified at 30 U.S.C. §§ 901-45.

was to provide benefits to coal miners who were totally disabled due to pneumoconiosis, commonly known as black lung disease, and to surviving dependents of miners whose death was due to that disease. 30 U.S.C. § 901(a). Although the federal government assumed responsibility for paying claims prior to 1973, the statute provided that mine operators would be subject to liability for claims after January 1, 1973, to the extent that state workmen's compensation laws were determined to provide insufficient protection.[3] The statute provided elaborate presumptions and procedures for determining benefits, whether paid by the federal government or mine operators.

In origin, BLBA clearly excluded railroad employees from its coverage because the term "miner" was limited to those persons employed in "an underground coal mine."[4] This exclusion is not surprising because Title IV, establishing the BLBA benefits program, was explicitly based on Congress' finding that state workmen's compensation laws were in many cases inadequate to protect miners stricken with black lung disease.[5] Railroad employees, by contrast, have been and are protected by a set

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[3] These dates, which are not of direct concern in this case, were altered by later amendments. The mine operators pay the benefits either directly to claimants or indirectly by contributing to a disability trust fund based on the amount of coal each operator produces. The statutory plan is discussed in detail by this Court in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

[4] See 83 Stat. at 793. This statement assumes, as does discussion throughout this petition, that the railroad in question is providing transportation service and is not itself the operator of a coal mine.

[5] The statute stated that "few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents." 30 U.S.C. § 901(a). See also *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 8.

of related federal benefit statutes providing comprehensive employer liability and employee protection in the railroad industry.

The keystone of this railroad legislation is the familiar Federal Employers Liability Act, 45 U.S.C. §§ 51-60 ("FELA"), whose coverage has been held to extend to occupational diseases including lung diseases.[6] Also, the Railroad Retirement Act, 45 U.S.C. §§ 231-31u, provides, in addition to ordinary retirement benefits, an annuity for railroad employees disabled after specified periods of employment. Finally, the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351-67, gives qualified railroad employees benefits for disabilities due to physical injury and disease. Congress' rationale for implementing the BLBA benefits program for miners therefore did not apply to railroad employees who were already covered by a range of protective programs.

Congress amended Title IV in 1972 and 1978, and it is the 1978 amendment that sparked the present controversy.[7] The term "miner" had been extended to miners who worked in surface mines, by deletion of the word "underground," in 1972. 86 Stat. at 153. The 1978 Act further extended the term "miner," in an amendment originating in the Senate, to mean:

> "Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around

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[6] *E.g.*, *Urie* v. *Thompson*, 337 U.S. 163 (1949) (silicosis); *Atchison, T. & S.F. Ry.* v. *Preston*, 257 F.2d 933 (10th Cir. 1958) (fibrosis).

[7] Black Lung Benefits Act of 1972, 86 Stat. 150; Black Lung Benefits Reform Act of 1977, 92 Stat. 95, enacted in 1978 ("1978 Act").

> a coal mine, to the extent such individual was exposed to coal dust as a result of such employment."[8]

The purpose of the 1978 amendment, so far as it concerned transportation, was to embrace such persons as "outside" coal mine employees who might truck coal from the mine mouth to the "tipple," where the coal may be collected and loaded on a train. S. Rep. No. 95-209, 95th Cong., 1st Sess. 20-21 (1977). However, the Senate Report which proposed the 1978 amendment stated explicitly that the new definition of "miner"

> "does not contemplate inclusion of those workers employed by a railroad, trucking company, or barge line unless such company also operates a mine." S. Rep. No. 95-209, *supra*, at 21.

Despite this explicit statement of Congressional intent, the Secretary of Labor made an administrative determination that railroad employees could now be included within the term "miner" even though they were employed solely by the railroad and performed ordinary railroad functions.[9] The Secretary of Labor first took this position in 1979 guidelines for determining liability under BLBA and then reasserted the position in 1981 guidelines that prevail today.[10] The Secretary of Labor's "examples of coverage and non-coverage" make clear that railroad

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[8] 30 U.S.C. § 902(d). After the 1972 amendment, and until 1978, the statute read: "The term 'miner' means any individual who is or was employed in a coal mine."

[9] The Secretary of Labor administers the BLBA provisions that impose liability on employers (see 30 U.S.C. § 902(c)) and has extensive rulemaking authority. 30 U.S.C. §§ 925, 931-32, 933-34.

[10] See BLBA Transmittal No. 81-3, Feb. 25, 1981, revising Department of Labor's *Coal Mine (BLBA) Procedure Manual*, Part 2 (Claims), ch. 2-600 (definition of coal miner). The 1981 guidelines are reprinted as Appendix H.

employees are included as "miners." His examples of covered employees include "[a] claimant employed by a railroad company to maintain track between the extraction site and tipple," and "[a] claimant employed by a railroad company as a conductor on trains which pick up raw, unprocessed coal at a coal mine and carry it to a preparation facility . . . ." Pet. App. 34a.

Stimulated by the Secretary of Labor's determinations, well over 1,000 claims for black lung benefits have now been filed by present or former railroad employees against the railroads.[11] Since each successful claim represents a potential liability of the railroad of about $150,000, the railroads' potential total liability—merely for claims filed so far—represents well over $150 million.[12] The impact of the Secretary of Labor's decision to include railroad employees is apparent.

Even to defend against such claims individually is an expensive and time-consuming process. A claim for BLBA benefits is initially passed upon by a deputy commissioner who investigates and makes an initial determination. A dissatisfied party, whether the responsible employer or the miner, can obtain a hearing before an administrative law judge, and his decision can be appealed to the Benefits Review Board, which in turn may be reviewed in the Court of Appeals for the circuit in

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[11] The figure was over 700 at the time the District Court action was commenced and it has now grown to the point where the railroads' best estimate is that approximately 1,200 claims are pending.

[12] The railroads' estimate below, based on an insurance appraisal, was that a benefits claim for a miner has a value of about $175,000 on average and for a miner's survivor $120,000 on average.

which the injury occurred.[13] The railroads estimated in affidavits filed below that it costs several thousand dollars per claim merely to litigate the claim through the hearing stage, because both medical and employment histories and evidence have to be gathered and presented in each case. Faced with this multitude of claims and a threshold legal issue of statutory coverage, the railroads initiated the present case, after an unsuccessful effort to persuade the Department of Labor to fashion an administrative procedure to resolve the coverage issue swiftly.

B. The Proceedings Below

By a complaint filed in the District Court in 1980, 15 railroads which transport coal brought suit against the Secretary of Labor and other officials involved in the administration of the BLBA program. The railroads charged that the Secretary of Labor's determination to include railroad employees as miners under BLBA represented administrative action in violation of statutory authority.

It has been settled for 80 years that a federal court has equitable power to enjoin federal officials acting in excess of federal statutory or constitutional authority.[14] The District Court's "subject matter jurisdiction" to entertain

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[13] See 33 U.S.C. § 921(c), made applicable by 30 U.S.C. § 932(a). During these further proceedings, benefits may be paid based upon the deputy commissioner's determination. If ultimately sustained, they are taxed against the employer, together with interest, penalties and attorney's fees.

[14] "Since the leading case of *American School of Magnetic Healing* v. *McAnnulty*, [187 U.S. 94 (1902)], the courts have recognized a cause of action for a person injured when a Government official acts unconstitutionally or in excess of his statutory power." Note, 88 *Harv. L. Rev.* 980, 981-82 (1975) (footnotes omitted).

such a claim is also well established. A suit to enjoin a federal official from unlawfully implementing a federal statute is a civil action "arising under the laws . . . of the United States" (28 U.S.C. § 1331) and, in the case of BLBA, is also one "arising under [an] Act of Congress regulating commerce . . . ." 28 U.S.C. § 1337(a).[15]

There is direct precedent for such an injunction action against unlawful enforcement of BLBA. In two prior cases, District Courts have entertained injunction actions seeking to enjoin federal officials from implementing BLBA on the ground that certain statutory provisions in question were unconstitutional and that regulations promulgated under other provisions exceeded statutory authority.[16] Not only did the District Courts consider these cases on the merits but *this* Court reviewed their decisions on the merits, affirming summarily in one case, and writing a lengthy opinion in the other.[17] In each case, the basis for the plaintiffs' concern was potential liability under BLBA, a threshold legal issue was presented, and the District Court and this Court assumed and exercised jurisdiction to resolve the controversy.[18]

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[15] 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* §§ 3568, 3574 (1975). These statutory provisions were cited to the District Court in the complaint (para. 1(a)) and constitute the basis for its subject matter jurisdiction.

[16] See *Turner Elkhorn Mining Co.* v. *Brennan*, 385 F. Supp. 424 (E.D. Ky. 1974); *NICOA* v. *Brennan*, 372 F. Supp. 16 (D.D.C. 1974).

[17] *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. 1, *aff'g in part and rev'g in part Turner Elkhorn Mining Co.* v. *Brennan*, *supra*; *NICOA* v. *Brennan*, 419 U.S. 955 (1975), *summarily aff'g NICOA* v. *Brennan*, *supra*.

[18] At that time, a procedural statute (since repealed) required a three-judge District Court to consider those counts in the *NICOA* and *Turner Elkhorn* complaints raising constitutional issues. The

In their complaint in this case, the railroads' first claim was that the 1978 Act did not extend to railroad employees since the legislative history clearly stated that Congress did not intend to include such employees as miners.[19] In the alternative, the railroads asserted that if Congress had meant to apply BLBA to railroad employees, the statute would be unconstitutional on a number of grounds; as an instance, the legislative evidence that supported certain of the BLBA statutory presumptions as applied to miners had no similar factual basis if applied to railroad employees. The railroads sought the same injunctive relief that had been sought in *Turner Elkhorn* and *NICOA* and had been granted by both District Courts in those cases.[20]

The Secretary of Labor admitted in the District Court that, under his administrative determination, railroad employees could be treated as miners and the railroads could be subject to BLBA liability. Answer to plaintiffs' request for admissions, p. 2. He moved to dismiss the case on the ground that the railroads were required to litigate each of the benefit claims through the administrative process in order to assert that railroad employees were not covered. The railroads cross-moved for summary judgment on the merits. As the District Court found, "the

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repeal of this requirement does not affect District Court jurisdiction except to remove the requirement for three judges to decide such constitutional claims. See pp. 13-14, below.

[19] The railroads also asserted, as alternative grounds, that they could not be treated as "operators" under the statute and that railroad facilities do not constitute mines.

[20] In each case, the District Court initially granted injunctive relief. This Court affirmed the injunction in *NICOA* but reversed in *Turner Elkhorn* on the merits.

parties agree[d] that there is no genuine issue as to any material fact, and this case should be decided as a matter of law." Pet. App. 14a-15a.

In its decision, the District Court held that it had jurisdiction, that the case presented "purely legal issues involving the construction of a statute," and that the pendency of hundreds of BLBA benefit claims against the railroads justified prompt resolution of the statutory coverage issue. Pet. App. 15a. Analyzing the legislative history, the District Court found that "it is clear . . . that Congress did not intend the amended definition [of miner] to include railroad employees," and the court found ample explanation for this fact in the coverage provided to railroad employees by three other federal statutes protecting railroad employees. Pet. App. 16a-17a. The District Court enjoined the Secretary of Labor from implementing BLBA to include railroad employees as miners. Pet. App. 21a-22a.

On review, the United States Court of Appeals for the Sixth Circuit reversed. Pet. App. 2a. Ignoring *Turner Elkhorn* and *NICOA*, the Sixth Circuit held that the District Court "lacked jurisdiction" to grant relief. *Id.* The Court of Appeals did not say that Congress had explicitly barred District Court actions to resolve broad threshold issues of statutory coverage. Instead it held that BLBA's provisions for administrative processing and appellate review of individual benefit determinations (see pp. 6-7, above) impliedly withdrew jurisdiction from the District Court to entertain the railroads' injunction action, even though that injunction action was not directed at any particular benefit claim.

The Sixth Circuit said that District Court jurisdiction might in fact exist in a case where the Secretary of Labor was "patently" violating his authority. Pet. App. 9a.

However, the Court of Appeals found no such patent error in the Secretary of Labor's inclusion of railroad employees as miners; the court reached this conclusion primarily because it believed (mistakenly) that the new statutory definition of miner had not been framed by the Senate and the Senate's clear exclusion of railroads should therefore be disregarded. Pet. App. 10a.[21] Although the Court of Appeals said it was not ruling definitively on the statutory coverage issue, its discussion treated the issue at some length.[22]

The railroads filed a timely petition for rehearing which was denied without further opinion. Pet. App. 13a. Accordingly, in the absence of review by this Court, the District Court proceeding will be dismissed on jurisdictional grounds and the railroads will be compelled to litigate the statutory coverage issue, at significant expense in each case, through a series of time-consuming administrative proceedings, which in turn will be reviewable in Courts of Appeals in different circuits where the railroads operate. In that event, there will be several years of wasteful, expensive and unnecessary litigation in order to resolve the simple, threshold statutory issue whether Congress did or did not intend to include railroad employees as "miners" under BLBA.

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[21] The Sixth Circuit's misunderstanding of the legislative history is discussed at pp. 19-24, below, but its error can be discerned at a glance by comparing the Senate's proposed definition of "miner" with the almost identical language actually enacted. Both are set forth at Pet. App. 24a.

[22] Although the Court of Appeals' patent-abuse standard is not relevant because jurisdiction to review the Secretary of Labor's decision does exist in the District Court, the discussion of the merits at pp. 19-24, below, shows that the Secretary of Labor did commit patent error in interpreting the statute.

ARGUMENT

The Court of Appeals' decision on the jurisdictional issue directly conflicts with two decisions of this Court (*Turner Elkhorn* and *NICOA*) since both cases necessarily recognized the jurisdiction of District Courts to resolve threshold legal issues under BLBA. This square conflict and the continuing nature of the jurisdictional issue clearly warrant certiorari. When considering the jurisdictional issue, this Court should also resolve the merits of the controversy. The question whether BLBA covers railroad employees as "miners" involves thousands of claims and millions of dollars, and this threshold legal issue will not be illuminated by further proceedings either at the administrative level or in other appellate courts.

I. The Sixth Circuit's Decision That the District Court Lacked Jurisdiction Conflicts Directly With Two Decisions of This Court Involving the Same Statute, Is Patently Mistaken, and Presents an Important and Recurring Jurisdictional Issue.

1. This case involves a direct conflict between the decision below and two decisions of this Court. As already noted, two prior District Courts—one in Kentucky (*Turner Elkhorn*) and one in the District of Columbia (*NICOA*)—decided on the merits injunction actions to prevent the Secretary of Labor or other executive officials from unlawfully implementing BLBA. Those cases, like this one, involved assertions that claimed statutory action was unconstitutional and claimed administrative action exceeded statutory authority. Injunctive relief was granted by both District Courts; and in one case this Court affirmed the relief granted (*NICOA*) and in the other it reversed on the merits without questioning the District Court's jurisdiction (*Turner Elkhorn*).

These prior cases recognized the authority of District Courts to resolve threshold legal issues under BLBA through District Court injunction actions against the Secretary of Labor.[23] This case involves an identical injunction action, seeking threshold legal determinations under the same statute, and it involves, like the earlier cases, both constitutional and statutory challenges. Indeed, the central issue presented—the coverage of a key statutory term ("miner")—is closely akin to an issue litigated on the merits in *NICOA* (the scope of the term "operator"). It is difficult to imagine a more direct conflict between the decision below and the decisions of this Court in *NICOA* and *Turner Elkhorn*.[24]

At the time of *Turner Elkhorn* and *NICOA*, former 28 U.S.C. § 2282 (repealed August 12, 1976), required constitutional attacks on provisions of BLBA to be heard by a three-judge District Court (with direct review in this Court), and some cases required a bifurcated proceeding

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[23] In *NICOA*, the District Court found that it "has jurisdiction over the subject matter of and the parties to these actions" (372 F. Supp. at 23); and in *Turner Elkhorn*, the District Court found that the constitutional challenges were within the jurisdiction of a three-judge District Court and the challenges to administrative regulations "are within the jurisdiction of a single judge court." 385 F. Supp. at 426. This Court did not write an opinion in the former but implicitly affirmed the assertion of jurisdiction by affirming the case summarily on the merits; and in *Turner Elkhorn*, this Court recognized the jurisdiction of a three-judge District Court over the constitutional challenges and that of "a single district judge" over the challenges to regulations. 428 U.S. at 13. See also *id.* at 37 n.41.

[24] *Turner Elkhorn* was expressly cited to the Sixth Circuit (plaintiffs/appellees' response to defendants/appellants' motion for summary reversal, p. 4) as was the *NICOA* case, although in a somewhat different context. Brief for appellees, p. 46. Neither decision was discussed by the Sixth Circuit.

so that attacks on the Secretary of Labor's rules or interpretations were heard by a single district judge (with further review in the Court of Appeals). However, Section 2282 did not create either a new cause of action or new subject matter jurisdiction for the federal district courts; it was a procedural requirement as to the number of district judges required to sit. The only impact of Section 2282's repeal is that in the present case the single district judge could have decided the constitutional issues, as well as statutory interpretation issues, if it had been necessary to reach them.

2. District Court review of the Secretary of Labor's determination is also consistent with general precedent and policy concerning review of administration action. The Secretary of Labor's guidelines, construing "miner" to include railroad employees, is admittedly a legal determination concerning statutory provisions which the Secretary of Labor administers. The determination, which is explicit and admitted (see pp. 5-6, 9, above), is no less reviewable because the Secretary has chosen to call it a "guideline," as the Government has recognized and the courts have held in similar cases.[25] In short, the Secretary of Labor has specifically rejected the railroads' legal position that a railroad employee cannot under the statute be a "miner" where the railroad does not operate the mine.

This threshold determination—like review of the Secretary of Labor's construction of the term "operator" in *NICOA*—is presumptively subject to judicial review. As

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[25] See, *e.g.*, *Western Coal Traffic League* v. *United States*, 694 F.2d 378 (5th Cir. 1982), *modified en banc on other issues*, slip. op. entered November 14, 1983. "The fact that the [ICC] used the term 'guidelines' is not controlling: it is the impact not the phrasing that matters." 694 F.2d at 392 n.61.

this Court emphasized in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), there is a presumption in favor of judicial review which "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. There is no statute that specifically precludes such review of the Secretary of Labor's determinations, nor is there any BLBA legislative history that suggests Congress rejected such review. Compare *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411 (1965).

Precedent aside, there are strong policy arguments for permitting judicial review of such threshold determinations, whether the challenges are constitutional or statutory. When a threshold legal issue is presented, as it was in *Turner Elkhorn* and *NICOA* and as it is in this case, deferring judicial review means that the same issue has to be litigated in a large number of administrative proceedings before there is a clear judicial resolution. In the case of BLBA, the administrative proceedings are drawn out and expensive. See pp. 6-7, above. Considerations of efficiency clearly justify judicial review, and the only baffling question in this case is why the Secretary of Labor should be so anxious to avoid review of his interpretation of the statute.[26]

3. The Sixth Circuit's analysis of District Court jurisdiction, which does not discuss either *Turner Elkhorn* or *NICOA*, is completely unpersuasive. It consists primarily of expressions of doubt as to the bases for a

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[26] A leading scholar has remarked on, and criticized, the tendency of government agencies to throw up—almost automatically and by reflex—a smokescreen of procedural defenses ("intricacies within intricacies") whenever a suit is brought against a government agency or official. See K. Davis, *Discretionary Justice* 158-59 (1969).

cause of action and District Court subject matter jurisdiction in this case. Yet, both the cause of action—an equity suit to enjoin federal official action in excess of authority—and the District Court's subject matter jurisdiction—Sections 1331 and 1337(a) of the Judicial Code—are indisputable. See pp. 6-7, above.

The real basis for the Sixth Circuit's decision is its inference that Congress, by providing for Court of Appeals review of the grant or denial of individual benefit claims, impliedly meant to foreclose a District Court action directed at the Secretary of Labor's threshold legal determinations. This inference is not only unsupported by legislative history and contrary to *Turner Elkhorn* and *NICOA*, but it has no application to this suit: the present action does not seek District Court review of any grant or denial of benefits to particular claimants. It is an attempt to review a general administrative determination by the Secretary of Labor, for which Congress has never designated a specific statutory review procedure. "Jurisdiction to review agency actions not embraced by the relevant special review provision . . . lies in any other 'court of competent jurisdiction' pursuant to general jurisdictional statutes that are otherwise applicable."[21]

The Sixth Circuit invoked this Court's decision in *Whitney National Bank* v. *Bank of New Orleans*, *supra*, 379 U.S. 411, to support its decision; but its misinterpretation of Whitney provides yet a further basis for certiorari. In that case, Congress had entrusted to the Federal Re-

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[21] Note, 63 *B.U.L. Rev.* 765, 774-75 (1983). See, *e.g.*, *NRDC* v. *NRC*, 606 F.2d 1261, 1266 n.13 (D.C. Cir. 1979); *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F.2d 549, 555-57 (2d Cir. 1978); *Bituminous Coal Operators' Ass'n* v. *Secretary of Interior*, 547 F.2d 240, 243 (4th Cir. 1977).

serve Board the question whether new banks could be established under a holding company structure, the Federal Reserve Board had approved the creation of such an arrangement for two Whitney banks, and competing banks had sought judicial review of the FRB decision in the Fifth Circuit pursuant to a direct review statute. The opponent banks also began a duplicative District Court action to litigate the same legal issue by seeking to enjoin the Comptroller of the Currency from issuing a final necessary certificate to a new Whitney bank. This Court held that such duplicative District Court litigation, collaterally attacking the FRB determination then at issue in the Fifth Circuit, was impermissible.

Whitney provides a striking contrast to the present case. The railroads are not collaterally attacking any grant or denial of benefits but are seeking to resolve a threshold legal issue reflected in the Secretary of Labor's general determination as to the scope of the statute. District Court action here does not represent duplicative litigation; indeed, it is intended to avoid a multiplication of proceedings by obtaining prompt resolution of a legal issue that would otherwise have to be litigated repeatedly. Finally, unlike *Whitney*, there is no legislative history specifically suggesting that Congress considered and then rejected the possibility of District Court relief. See 379 U.S. at 419-20.

4. A final reason for certiorari is that the jurisdictional issue presented is a recurring one and important to the administration of BLBA. The statute is elaborate, involving a number of novel provisions including far-reaching statutory presumptions. Quite apart from railroads and their employees, BLBA governs thousands of potential and present claimants and literally billions of dollars in benefits. Since 1970, benefits have been provided for over

500,000 individuals and $5 billion in benefits have been disbursed. See S. Rep. No. 95-209, *supra*, at 1.

Therefore, the question whether District Court review is available under BLBA—to determine in advance threshold legal questions affecting a large number of claims—is one that ought to be resolved definitively (assuming *arguendo* this Court's prior decisions in *NICOA* and *Turner Elkhorn* have not done so). Even if those prior decisions of this Court are disregarded, there is now a direct conflict on the availability of District Court relief, with two three-judge District Courts granting such relief (*Turner Elkhorn* and *NICOA*) and two Circuit Courts including the Sixth Circuit disputing the availability of such relief.[28] If the jurisdictional issue under BLBA has not been resolved by prior decisions of this Court, as the railroads believe it has, then the issue represents "an important question of federal law which has not been, but should be, settled by this Court . . . ." Sup. Ct. R. 17.1(c).

Questions involving federal court jurisdiction are, as this Court has recognized in the past, peculiarly ones appropriate for resolution by this Court. This Court has repeatedly reviewed cases involving such jurisdictional issues, recognizing its "prime responsibility for the proper functioning of the federal judiciary."[29] In this case, where there is conflict with decisions of this Court, a

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[28] The other Court of Appeals decision, which is distinguishable on its facts but reaches the same result as the Sixth Circuit, is the Third Circuit's decision in *Compensation Department* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981).

[29] See R. Stern & E. Gressman, *Supreme Court Practice* 296-97 (5th ed. 1978) (citing numerous cases).

conflict between two three-judge District Courts and two Courts of Appeals, and a recurring jurisdictional issue affecting a major federal statute, the grounds for certiorari could not be more clear or substantial.

II. The District Court Correctly Held That "Miner" Does Not Include Employees of a Railroad That Does Not Operate a Mine, Since the Senate Committee That Drafted the Governing Language Said Precisely That in Virtually the Same Words.

1. On the merits of the case, the legal issue presented is clear and uncomplicated: did Congress intend the term "miner" as defined in the 1978 Act to embrace railroad employees in various circumstances, as the Secretary of Labor ruled, or did Congress intend that "the provision [not include] workers employed by a railroad . . . unless such company also operates a mine," as legislative history explicitly states and as the District Court held. See p. 5, above. This issue is appropriate for review and should be resolved now by this Court.

The term "miner" as it stood prior to 1978 could not conceivably be open to the Secretary of Labor's construction, because the pre-1978 language—enacted in 1972—defined "miner" to mean "any individual who is or was employed in a coal mine." 86 Stat. at 153. The only basis for even considering inclusion of railroad employees in the definition "miner" is the language added in 1978, redefining the term to mean:

> "Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around

> a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. § 902(d)

Whatever tension might otherwise exist between the operative term "miner" and the 1978 definition, Congress in passing the 1978 Act clearly said that it did not intend to include railroad employees in the expanded definition of "miner."

The decisive evidence is that the Senate, which originated the new definition[30] and crafted almost all the language ultimately enacted[31] said explicitly:

> "The provision [the new definition of "miner"] does not contemplate inclusion of those workers employed

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[30] The House bill as originally passed and reported (H.R. No. 4544, 95th Cong., 1st Sess. (1977)), proposed no change in the pre-1978 definition of "miner." See H.R. Rep. No. 95-151, 95th Cong., 1st Sess. 51 (1977).

[31] The Senate's language is almost identical to the language ultimately accepted by the Conference Committee. See Pet. App. 24a, setting forth both versions. The only differences are that the word "transportation" was shifted from the first sentence of the definition to the second and the phrase in the second sentence "during any period" was altered to "to the extent." *Compare* S. Rep. No. 95-209, *supra*, at 34 (Senate language), *with* 92 Stat. 95 (language enacted).

The reason for shifting the word "transportation" was, as the Conference Report explained, to narrow the Senate version by making clear that "transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust." H.R. Rep. No. 95-864, 95th Cong., 2d Sess. 15 (1978). This was accomplished by shifting the word "transportation" from the first sentence which has no qualifying final clause, to the second sentence which does have such a final qualifying clause ("to the extent such individual is exposed to coal dust as a result of such employment.")

> by a railroad . . . unless such company also operates a mine . . . . These exclusions are not the result of any judgment that such workers should not be compensated for occupational disease—they are merely beyond the scope of this legislation. S. Rep. No. 95-209, *supra*, at 21.

Senator Randolph, the floor leader for the Senate committee, made the same statement in explaining the amendment on the floor of the Senate.[32]

Congress' decision not to extend "the scope of this legislation" to "workers employed by a railroad" is not mysterious or aberrant. Such railroad workers are covered by a host of federal programs which clearly embrace occupational diseases. See p. 4, above. The very purpose of the BLBA was to remedy the lack of coverage in state workmen's compensation laws for coal miners—a problem that did not exist for railroad employees. Thus, the basic purpose of both BLBA and the amended definition, to close gaps in coverage, did not warrant application to railroad workers.[33]

However plain the language of a statute may appear to be, such language cannot prevail in the face of "a clearly expressed legislative intent to the contrary." *Consumer Product Safety Comm'n* v. *Sylvania*, 447 U.S. 102, 108 (1980). Here the Senate Committee that originated and

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[32] Senator Randolph stated:

> "The term 'miner' is redefined to include workers who process and transport coal, self-employed miners, coal mine construction workers are also included, but only to the extent that they worked in conditions substantially similar to conditions in underground mines. *Railroad*, trucking, bargeline and coke oven *workers are not included in the definition.*" 123 Cong. Rec. 24,239 (1977) (emphasis added).

[33] Since railroad employees already enjoy substantial protection, inclusion of them as miners could actually result in double recovery.

drafted the statutory language explicitly said that it did not include railroad workers, the Senate floor manager repeated that statement, and there is nothing whatever in the legislative history that contradicts that interpretation. It is difficult to imagine how Congress' will to exclude railroad employees could be made clearer. The District Court, in finding that "Congress did not intend the amended definition to include railroad employees" (Pet. App. 16a) was unquestionably right.

2. The Sixth Circuit did not squarely reject the District Court's decision on the merits but expressed doubt about its correctness. None of the reasons given by the Sixth Circuit warrants such a doubt.

The Sixth Circuit began by observing that the statute "expressly encompasses not only mine operators in the traditional sense but also 'any independent contractor performing services or construction at [a] mine.' " Pet. App. 9a. The difficulty is that the "independent contractor" clause, added in 1977, had an explicit and limited purpose that had nothing to do with railroad or other transportation activities: it was intended to embrace mine construction companies or companies engaged in the extraction of coal for the benefit of the mine owner.[34] In all events, the only individuals who can be awarded benefits under Title IV are "miners" (and relatives or dependents). See 30 U.S.C. §§ 922(b), 931(a). The legislative

[34] Federal Mine Safety and Health Amendments Act of 1977, 91 Stat. 1290; S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977). In fact, railroads so far as they "contract" to carry coal normally do not contract with the mine operator but with the purchaser or a broker.

history shows that railroad employees are not miners even under the expanded 1978 definition of the term.[35]

The Sixth Circuit then addressed the 1978 amended definition of "miner" and the language of the Senate Report and Senator Randolph's floor statement. See pp. 20-21, above. It concluded that the District Court's reliance on this language "appears somewhat misplaced" because "the Senate bill was *not passed* and . . . in lieu thereof the House bill was enacted." Pet. App. 10a (emphasis in original). The problem with this assertion is that it is flatly wrong. The expanded definition of "miner" was, both in substance and in practically all of its words, crafted by the Senate, as the Conference Report explicitly stated.[36] In enacting the Senate version, Congress necessarily carried with it the Senate explanation of the definition's meaning, since there is no significant variation in the final statutory language and no disagreeing gloss in the Conference Report or anywhere else.

The Sixth Circuit referred finally to the "considerable discretion" of the Secretary of Labor in applying BLBA. Pet. App. 11a. It is unnecessary to spend much time

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[35] It is sufficiently clear that Congress was not thinking of railroads in 1977 when it referred to independent contractors, that this term provides an additional, alternative reason for reaching the District Court's result. However, the legislative history of the term "miner" is so clear that this additional ground for excluding railroads need not be considered at this stage.

[36] H.R. Rep. No. 95-864, *supra*, at 15, states that "[t]he conference substitute conforms generally to the Senate amendment with an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around coal mines and are exposed to coal dust." The final version adopted by the Conference Committee was actually a slightly narrowed version of the Senate language. See p. 20, n.31, above.

discussing this general assertion. If one thing is clear, it is that administrative agencies or executive departments do not have power to expand statutory language to cover persons or situations which Congress has expressly said are not to be included.

3. Review by this Court of the merits of this case is appropriate now. The statutory coverage issue affects many pending and thousands of potential claims. Over 1,000 cases by railroad employees are already pending, representing well over $150 million in potential liability. See p. 6, above. The issue whether BLBA covers railroad employees is thus itself a major and recurring question.[37]

In *Turner Elkhorn*, this Court implicitly recognized that the interpretation and validity of key provisions of BLBA presented threshold issues that ought to be resolved promptly and by this Court. The posture of the case was almost identical to the present one, namely, an injunction action against the Secretary of Labor in which the District Court had passed upon validity of the Secretary's proposed implementation of the statute. The question presented in this case is no less important or significant and clearly involves a federal question that should be settled by this Court. The only question is when.

Deciding the coverage issue now is highly desirable. The issue is purely one of statutory construction and interpretation of legislative history. It is a straightfor-

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[37] The railroads' position, supported by legislative history, is that railroad employees are simply not embraced by the term "miner" (assuming—as is almost always the case—that the railroad itself does not operate the mine). The question where the line would be drawn *among* railroad employees, if the railroads and the District Court were incorrect in their construction of the statute, is one not presented by this case.

ward issue, confined to a brief two-sentence definition that is the subject of only a few paragraphs—albeit very explicit paragraphs—of legislative history. The Secretary of Labor's position is now known. The definitive views of the District Court and tentative views of the Court of Appeals are available. No additional analysis or insight would be provided by having additional appellate court decisions on this issue before it is resolved by this Court.[38]

A delay, on the other hand, would involve substantial costs. If this Court defers action on the merits until the matter has been resolved by other courts, hundreds of individual claim cases will go forward at the administrative level, at very substantial expense. See p. 6, above. The liability of the railroads, and the proper course for disabled employees to pursue, will remain uncertain for at least a substantial period. In the end, the statutory coverage issue affecting thousands of claims and hundreds of millions of dollars is certain to return to this Court.

The very purpose of sustaining District Court jurisdiction is to permit a prompt disposition of the threshold issue of statutory coverage. That purpose could be frustrated if the Court were to grant review on the jurisdictional issue and then require further proceedings before the merits were resolved. In addition to the need for a prompt determination of the merits, it is important that

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[38] There is no doubt that this Court has authority to decide any legal issue embedded in a case that is properly before it. Since the issue of District Court jurisdiction is before this Court, it is also entitled to resolve the merits at the same time. See R. Stern & E. Gressman, *supra*, at 456-61.

the jurisdictional and merits issues be considered together by this Court because of the potential interrelationship between them. See pp. 10-11 & n.22, above. Accordingly, certiorari should be granted on both issues in this case.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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December 1983

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APPENDICES

APPENDIX A

List of Petitioners

Baltimore and Ohio Railroad Company
Chesapeake and Ohio Railway Company
Clinchfield Railroad
Illinois Central Gulf Railroad Company
Missouri Pacific Railroad Company
Richard B. Ogilvie, Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor
Seaboard System Railroad, Inc.*
Union Pacific Railroad

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*Seaboard System Railroad, Inc., was formed by the merger of the Louisville and Nashville Railroad Company, an appellee below, into Seaboard Coast Line Railroad, Inc.

APPENDIX B

No. 82-5072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUISVILLE AND NASHVILLE RAILROAD CO, ET AL.,
Plaintiffs-Appellees,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants-Appellants.

On Appeal From The United States District Court For The Western District Of Kentucky.

Decided and Filed August 12, 1983.

Before: EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge.

ENGEL, Circuit Judge. The Secretary of Labor appeals from a judgment of the district court which permanently enjoins him from applying the Black Lung Benefits Act ("BLBA"), 30 U.S.C. § 901 *et seq.*, to railroad employees, former railroad employees, or railroads. Upon consideration, we conclude that the district court lacked jurisdiction to grant the declaratory and injunctive relief sought by the plaintiffs. Accordingly, we remand with directions to vacate the judgment and to dismiss the action.

Fifteen railroads which transport coal in interstate commerce brought this action in the United States District Court for the Western District of Kentucky pursuant to 28 U.S.C. §§ 1331, 1337, 1361 and 2201, as amended, challenging Department of Labor guidelines for determining the eligibility of

individuals engaged in coal transportation for BLBA benefits.[1] At the time this suit was commenced, more than 700 claims had been filed under the BLBA by former and current railroad employees. The district court accepted the railroads' argument that as a matter of law they are not included within the definition of "operator" under the BLBA and, hence, are not liable for BLBA benefits.

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[1] The BLBA establishes a program for payment of benefits to miners totally disabled by pneumoconiosis (black lung disease) and to their survivors. *See Lawson* v. *Secretary of Health and Human Services*, 688 F.2d 436 (6th Cir. 1982). The BLBA authorizes the Secretary of Labor to promulgate regulations prescribing standards of eligibility for claims filed after December 31, 1972 (Part C). 30 U.S.C. § 921; *see also Lawson*, 688 F.2d 436. The definition of "miner" under the BLBA was expanded by the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, to include:

> any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.

Id. § 2(b); 30 U.S.C. § 902(d) (Supp. 1977).

The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. 95-164, amended the definition of "operator" as well, adding to "any owner, lessee, or other person who operates, controls, or supervises a coal mine" the phrase "or any independent contractor performing services or construction at such mine." *Id.* § 102(b); 30 U.S.C. § 802 (Supp. 1977).

Based on these amendments, the Department of Labor issued guidelines defining "the transportation of coal" for the purposes of determining eligibility under the BLBA:

> *Transportation* of coal includes the transportation of coal usually performed by a coal mine operator, transportation from extraction site to preparation plant or tipple, and any transportation of coal up to the time when the extraction and preparation of the coal has been completed or the time when the extracted coal enters into the stream of commerce.
>
> Thus, persons engaged in transportation of coal from a mine site to the ultimate consumer of the coal, or in functions integral

It is well established that the Declaratory Judgment Act, 28 U.S.C. § 2201, is not an independent source of federal jurisdiction. *Schilling* v. *Rogers*, 363 U.S. 666 (1960); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Michigan Savings and Loan League* v. *Francis*, 683 F.2d 957 (6th Cir. 1982); *King* v. *Sloan*, 545 F.2d 7 (6th Cir. 1976). Similarly, some courts have held that 28 U.S.C. § 1361, which provides for "original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owned to the plaintiff" does not provide an independent ground for subject matter jurisdiction. *Starbuck* v. *City and County of San Francisco*, 556 F.2d 450 (9th Cir. 1977); *Craig* v. *Colburn*, 414 F.Supp. 185 (D.C. Kan. 1976), *aff'd*, 570 F.2d 916 (10th Cir. 1978); *Jeno's, Inc.* v. *Commissioner of Patents and Trademarks*. 498 F.Supp. 472 (D.C. Minn. 1980). *But cf. Dow Chemical* v. *Costle*, 480 F.Supp. 315 (E.D. Mich. 1978), *aff'd*, 659 F.2d 724 (6th Cir. 1981) (dictum inferring section 1361 may independently grant subject matter jurisdiction). A clearer limitation on section 1361 jurisdiction is recognized where an exclusive statutory method of reviewing administrative action exists. *CETA Workers Organizing Committee* v. *City of New York*, 617 F.2d 926 (2d Cir. 1980); *Loveladies Property Owners Association, Inc.* v. *Raab*, 430 F.Supp. 276 (D.N.J. 1975), *aff'd*, 547 F.2d 1162 (3d Cir. 1976); *see also Wilson* v. *Secretary of Health and Human Services*, 671 F.2d 673 (1st Cir. 1982) (availability of administative remedies and judicial review precludes mandamus jurisdiction); *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101 (D.C. Cir. 1977) (same). Like-

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to that activity, would not be covered, even if part of their time is spent in or around the mine site. However, those engaged in transport functions between the extraction site and the tipple would be covered where their work is integral or necessary to the preparation or extraction process.

App. 155 (Revised Chap. 2-600, Coal Mine (BLBA) Procedures Manual, BLBA Tr. No. 81-3). The railroads contend that this interpretation of the BLBA is erroneous.

wise, district court jurisdiction under 28 U.S.C. § 1337, over "any civil action or proceeding arising under any act of Congress regulating commerce or protecting trade and commerce . . ." may be precluded by a staturoy scheme of review. *Board of Trustees of Memorial Hospital* v. *NLRB*, 523 F.2d 845 (10th Cir. 1975); *United Electrical Contractors Association* v. *Ordman*, 258 F.Supp. 758 (N.D.N.Y. 1965), *aff'd*, 366 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967).

The same principle which limits jurisdiction under sections 1337 and 1361 applies with equal force to the general federal question jurisdiction granted in 28 U.S.C. § 1331. In *Memphis Trust Co.* v. *Board of Governors of the Federal Reserve System*, 584 F.2d 921 (6th Cir. 1978), our court held that "[g]eneral federal question jurisdiction under [§ 1331] . . . is not available . . . [w]here Congress has provided an adequate procedure to obtain review of agency action. . . ." *Id.* at 925.

Whitney National Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), provides the basic authority for this principle. That decision established that only those courts upon which Congress has bestowed authority have jurisdiction and that when Congress designates a forum for judicial review of administrative action, that forum is exclusive. *Id.* at 420, 422. We are convinced that with respect to the BLBA, Congress has conferred upon this court such sole and exclusive jurisdiction. In so holding, we agree with Judge Garth's analysis in *Compensation Department of District Five* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981). In that case, the United Mine Workers commenced an original action against the Secretary of Labor in district court contesting the Secretary's interpretation of BLBA provisions concerning the use of x-rays in determining the existence or non-existence of pneumoconiosis in a claimant. Judge Garth observed:

> The central issue in this case is whether subject matter jurisdiction over District Five's complaint exists in the district courts. We hold that it does not, because we agree with the district court that the scheme of review established by Congress for determinations of black lung dis-

ability benefits was intended to be exclusive. Thus, the proper method for contesting the Secretary of Labor's interpretation of § 413(b) is to exhaust the administrative remedies provided under the statute and then to seek review, if desired, in the court of appeals, rather than to seek an injunction against the Secretary in district court.

Underlying our conclusion that the district court lacked subject matter jurisdiction is the general rule that if "there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies." *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). Moreover, "there is a strong presumption against the availability of simultaneous review in both the district court and the court of appeals." *Sun Enterprises, Ltd.* v. *Train*, 532 F.2d 280, 287 (2d Cir. 1976). Because Congress has specifically provided for a statutory scheme whereby claims must first be decided administratively and then reviewed in the courts of appeals, with jurisdiction expressly provided for in the district courts only in specific, limited circumstances, our analysis begins with a presumption that the district court lacked subject matter jurisdiction over this action. We look then to whether an examination of the statute's legislative history, purpose, and design reveals circumstances appearing in this case which are sufficient to overcome that presumption.

667 F.2d at 340. Although *Compensation Department* dealt with interpretation of a different section of the BLBA, we find its discussion and analysis of the four considerations underlying the *Whitney National Bank* decision cogent and persuasive in this case as well. *See* discussion at 667 F.2d at 341-42.

In reaching a contrary conclusion, the district court relied primarily upon *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). That case held that the Federal Food, Drug and Cosmetic Act did not prohibit pre-enforcement review of certain regulations promulgated by the Commissioner of Food and Drugs where the issue of statutory construction was "purely legal" and the regulations challenged were "final agency action" within section 10 of the Administrative Procedure Act ("APA"). Noting that the existence of 700 pending claims for

black lung benefits against the plaintiff railroads made the issue "fit for judicial decision," the district judge concluded that the applicability of the BLBA to railroads was a "purely legal issue" and that the Department of Labor's adoption of the challenged internal guidelines clarifying the definition of a "miner" constituted "final action." *See* note 1, *supra*.

With respect to *Abbott Laboratories*, it is sufficient to note that the decision dealt exclusively with application of the APA and that Congress in enacting the BLBA expressly excluded the provision of the APA. 30 U.S.C. § 956. Moreover, later authority indicates that *Abbott Laboratories* "arguably assumed with little discussion that the APA is an independent grant of subject matters jurisdiction." *Califano* v. *Sanders*, 430 U.S. 90, 105 (1977). *Califano* determined that in fact the APA does not grant jurisdiction. Abbott Laboratories merely dealt with the timing of judicial review and not with the source of primary subject matter jurisdiction at issue here.

Nearly all the cases which address the question of district court jurisdiction for nonstatutory review of administrative action recognize that in narrow circumstances some residuum of federal question subject matter jurisdiction may exist in the United States District Court, although apparently otherwise precluded by a comprehensive statutory review scheme. Thus, as Judge Garth observed in *Compensation Department:* "[i]f the remedies provided for in the statutory scheme of review are inadequate in a particular case, an argument can be made that Congress did not intend to forbid the district courts from taking jurisdiction." 667 F.2d at 343 (footnote omitted). These exceptional circumstances are outlined in a careful and illuminating opinion by Judge Spottswood Robinson in *Nader* v. *Volpe*, 466 F.2d 261 (D.C. Cir. 1972). In *Nader* the D.C. Circuit dismissed for lack of subject matter jurisdiction a complaint seeking a mandatory injunction requiring the Secretary of Transportation to disclose certain communications between his department and the Office of the President. Referring to

the scheme of judicial review under the National Traffic and Motor Vehicle Safety Act, the court observed:

> The legislative history of the Act is almost completely silent as to the exclusivity or concurrency of the review procedure which it specifies. Generally, however, when Congress has specified a procedure for judicial review of administrative action, *courts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review. . . .*"

466 F.2d at 265-66 (emphasis added) (footnote omitted).

As stated above, we belive *Compensation Department* convincingly establishes that the BLBA statutory scheme of review is exclusive. As Judge Garth pointed out, the BLBA allows for district court jurisdiction only in two very narrow situations involving enforcement of compensation orders:

> If an operator fails to pay an award of disability benefits for which he is liable, the successful claimant or the Secretary may bring an action in district court to enforce the order. *See* 33 U.S.C. § 921(d). Moreover, the Secretary may bring an action to enforce a lien against an operator who fails to make payments to the Black Lung Disability Trust Fund. 30 U.S.C. § 934(b)(4)(A). *See also* 33 U.S.C. § 918 (collection of defaulted payments).

667 F.2d at 339, n.6. In addition the BLBA provides that any party dissatisfied with the Benefits Review Board's determination of any "question of law or fact," 33 U.S.C. § 921(b)(3), "may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred." 33 U.S.C. § 921(c). Provisions for review of compensation orders and of decisions of the Benefits Review Board are comprehensively set out in 33 U.S.C. § 921.[2] Thus, under

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[2] Section 921(a) provides that a compensation order becomes final 30 days after it is filed in the Office of the Deputy Commission "unless proceedings for the suspension or setting aside of such order are instituted as provided by subdivision (b) of this section." 33 U.S.C.

this exclusive scheme of statutory review, in order to invoke district court jurisdiction, the railroads must show either a patent violation of agency authority or a manifest infringement of a substantial right irremediable under the statutory scheme. *Nader*, 466 F.2d at 265-66.

The plaintiff railroads' best argument here is to contend that the BLBA clearly and unquestionably excludes railroads from its operation and that therefore the Secretary has patently violated his authority. The statute, however, far from clearly excluding railroads, expressly encompasses not only mine operators in the traditional sense but also "any independent contractor performing services or construction at [a] mine." 30 U.S.C. § 802(d). This expanded definition does not clearly exclude railroads, especially when viewed in conjunction with the amended definition of "miners" which includes "an individual who works or has worked in . . . transportation in or around a coal mine. . . ." 30 U.S.C. § 902(d). On this point, the district court went beyond the statute and relied primarily on Senate

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§ 921(a). More importantly, section 921(b)(3) provides: "[t]he [Benefits Review] Board shall be authorized to hear and determine appeals raising a substantial *question of law* or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof." 33 U.S.C. § 921(b)(3) (emphasis added). Finally, section 921(e) states that: "[p]roceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title." 33 U.S.C. § 921 (e). Section 918 establishes district court jurisdiction for the specific purpose of collecting defaulted compensation payments. This limited grant of district court authority obviously does not apply in this case since no railroad employee claimant has yet been awarded benefits.

The BLBA adopted these adjudication procedures of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* for processing BLBA claims, 30 U.S.C. § 932(a). *See Director of Office of Workers' Compensation Program* v. *National Mines Corp.*, 554 F.2d 1267 (4th Cir. 1977).

Report No. 95-209, which states that the definition of miner "does not contemplate inclusion of those workers employed by a railroad. . . ." The court found that this statement was confirmed in a remark on the Senate floor by Senator Randolph, 123 Cong. Rec. 24,239 (1978). Finally, the district court reasoned:

> If Congress had intended the 1978 amendment to include employees from other industries such as rialroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced in Congress in 1972 to provide Black Lung Benefits to any individual employed in any industry who contracted Black Lung. This amendment was not enacted. *Montell* v. *Weinberger*, 546 F.2d 679 (6th Cir. 1976).

App. 342.[3]

The district court's reliance upon Senate Report 95-209 and Senator Randolph's statement appears somewhat misplaced. The legislative history indicates that the Senate bill was *not passed* and that in lieu thereof the House bill was enacted. 1978 U.S. Code Cong. & Ad. News 237. House Conference Report No. 95-864 accompanying the finally enacted legislation explains:

> The conference substitute conforms generally to the Senate amendment with an amendment to clarify that transportation and construction workers are covered only to the extent they work in or around a coal mine and are exposed to coal dust. The conference substitute elsewhere provides that coal mine construction and transportation

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[3] The district court also opined that extensive federal legislation already fully protected injured and disabled railroad employees under the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*; the Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*; and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.* None of these acts indicate any intention to preclude additional protections or benefits such as those provided by the BLBA. The mere existence of these three acts does not suggest a patent violation of authority on the Secretary's part.

> employers who are not also mine operators shall not be obligated to purchase insurance for the payment of claims under the Federal Mine Safety and Health Act of 1977. However, *the conference substitute* elsewhere *also provides that* coal mine construction and *transportation employers* who are not also mine operators *shall be individually liable for payment of approved claims in appropriate cases.* (See section 7, which amends the Act to require such employers to secure a bond or otherwise guarantee the payment of such claims once approved.)

1978 U.S. Code Cong. & Ad. News 309 (emphasis added).

The express language of the statute, the legislative intent expressed in the conference report accompanying the BLBA, and the express grants of authority to the Secretary of Labor in 30 U.S.C. §§ 932 and 957, reveal that the Secretary has considerable discretion in making initial determinations of BLBA applicability, such as the interpretations incorporated in the guidelines challenged here.

Although the issue of whether the Secretary has correctly exercised his rulemaking authority and other discretion is not properly before us,[4] the statutory scheme reveals that there has been no clear overreaching of administrative authority as would warrant the exercise of mandamus or other extraordinary authority by the district court.

It is true, as the district court pointed out, that Congress rejected proposed amendments which would have extended

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[4] Compare *Cumberland Capital Corp* v. *Harris*, 621 F.2d 246 (6th Cir. 1980), which also involved a party's attempt to circumvent the administrative process by obtaining a district court declaration that it was not within a statutorily defined class. The district court correctly dismissed the action for lack of subject matter jurisdiction. 490 F.Supp. 551 (W.D. Tenn. 1977), *rev'd* (on other grounds), 621 F.2d 246 (6th Cir. 1980). We were able to reach the merits of *Cumberland Capital's* substantive claim, however, because the petition for review in another case properly before us had been consolidated with in for consideration on appeal.

BLBA benefits very broadly to any industry whose working conditions might cause pneumoconiosis in its employees. *Montell* v. *Weinburger*, 546 F.2d 679, 681 (6th Cir. 1976). Nevertheless, in enacting later amendments Congress has recognized that the earlier definition of "miner" did not necessarily include all of those persons working "in or around a coal mine or coal preparation facility in the extraction or preparation of coal." *See* note 1, *supra;* 30 U.S.C. § 902(d). In fact, Congress expressly recognized that a person working in transportation in or around a coal mine might be exposed to coal dust as a result of such employment and should not be deprived of BLBA benefits merely because his employer is not an "operator" in the traditional sense. We point all of this out not with the intent of making any definitive construction of the BLBA, but only to demonstrate that the BLBA itself and its legislative history provide no basis for the exercise of district court jurisdiction premised on a finding of a patent violation of agency authority or a manifest infringement of substantial rights irremediable by the statutorily prescribed method of review. *Nader*, 466 F.2d at 265-66.

Accordingly, the judgment of the district court is vacated and cause remanded with instructions to dismiss the complaint for want of subject matter jurisdiction.

APPENDIX C

No. 82-5072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LOUISVILLE AND NASHVILLE RAILROAD CO, ET AL.,
Plaintiffs-Appellees,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants-Appellants.

FILED
Sep 28 1983
John P. Hehman, Clerk

ORDER

Before: EDWARDS, Chief Circuit Judge; ENGEL, Circuit Judge; and WEICK, Senior Circuit Judge.

Plaintiffs-Appellees having filed a petition for rehearing and modification of court's opinion with this court, and this court having considered said petition and finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk
JOHN P. HEHMAN[*]

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[*] On Sept. 13, 1983, the railroads were denied leave to file out of time a suggestion of rehearing *en banc*.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action
No. 80-0611-L(G)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants.

MEMORANDUM OPINION

This is an action for declaratory judgment by the Plaintiffs, railroads which transport coal in interstate commerce, against officers and agencies of the United States charged with responsibility for the administration and enforcement of certain provisions of the Federal Mine Health and Safety Act, 30 U.S.C. § 801, *et seq.*, as amended (the "Act"). The question at issue is whether a railroad employee can be a "miner" within the meaning of the Act, and whether a railroad engaged in the transportation of coal can be a "mine operator" who is liable for the payment of Black Lung benefits under the Act. This case presents a justiciable controversy because there are more than 700 pending claims for payment of Black Lung benefits under the Act that have been filed by former and current employees of the Plaintiffs.

This case is before the Court on Plaintiffs' Motion for Summary Judgment, and Defendants' Cross-Motion for Summary Judgment. The parties agree that there is no genuine issue as to any material fact, and this case should be decided as a matter

of law. For the reasons stated herein, the Court holds that Plaintiffs' Motion for Summary Judgment must be granted and Defendants' Motion for Summary Judgment must be denied.

The Court has heretofore denied Defendants' Motion to Dismiss. Defendants argued that the Court has no jurisdiction because the Plaintiffs have not exhausted their administrative remedies. However, this controversy presents purely legal issues involving the construction of a statute, and the pendency of over 700 claims for Black Lung benefits makes these issues fit for judicial decision. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967); *Exxon Corporation* v. *Federal Trade Commission*, 588 F.2d 895 (3rd Cir. 1978). Defendants also based their Motion to Dismiss on the ground the Plaintiffs do not have standing. The Court has heretofore denied such motion because the Plaintiffs have sufficiently alleged that they have been injured by Defendants actions. *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978). Because this case does not involve the merits of any particular claim for Black Lung benefits, and the presence of any particular claimant would not contribute toward a resolution of the legal issues presented here, the Court has heretofore denied Defendants' Motion to Dismiss under F.R.C.P. 19 and has also heretofore denied the motion of one Ellis Barker to intervene under F.R.C.P. 24.

Plaintiffs have alleged that they have been injured by Defendants' interpretations of the Act. The Department of Labor adopted an internal guideline in 1979 that included within the definition of "miner" persons performing transportation functions with respect to coal after it left the tipple or coal preparation plant. Circular 79-3, Exhibit A to Complaint. In 1981, the Department of Labor narrowed this internal guideline so that persons performing transportation functions are considered "miners" only as to functions performed between the coal extraction site and the tipple. BLBA Procedure Manual, Appendix A to Defendants' Points and Authorities in Support of Motion to Dismiss. However, the Defendants have admitted that employees of the Plaintiff railroads could be considered

"miners" in certain circumstances under the 1981 internal guideline, and railroads could be liable for payment of Black Lung benefits thereunder. Defendants' Answer to Plaintiffs' Request for Admission, Paragraph 1.

As originally enacted in 1969, the Act defined the term "miner" to mean "any individual who is or was employed in an underground coal mine." This definition was amended in 1972 to delete the word "underground." This definition was again amended in 1978 to include the following persons:

> Any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment. 30 U.S.C. § 902(d).

It is clear from the legislative history of the 1978 amendment that Congress did not intend the amended definition to include railroad employees. Senate Report No. 95-209 at pages 20-21 states that the amended definition would include so-called "outside men," that is, persons working for a coal mining company outside the mine area. However, the Senate Report states that "the provision does not contemplate inclusion of those workers employed by a railroad . . . ." This was confirmed on the Senate Floor by the floor manager, Senator Randolph. 123 Cong. Rec. p. 24239. If Congress had intended the 1978 amendment to include employees from other industries such as railroads, all Congress had to do was say so. It's just that simple. To the contrary; an all-inclusive amendment was introduced in Congress in 1972 to provide Black Lung benefits to any individual employed in any industry who contracted Black Lung. This amendment was not enacted. *Montell* v. *Weinberger*, 546 F.2d 679 (6th Cir. 1976).

An additional factor that must be given weight is that benefits for injured and disabled railroad employees are provided, and were provided prior to passage of the Act, under the Federal Employees Liability Act, 45 U.S.C. § 51, *et seq.*, the

Railroad Retirement Act, 45 U.S.C. § 231, *et seq.*, and the Railroad Unemployment Insurance Act, 45 U.S.C. § 351, *et seq.* In contrast, Congress made a finding when it enacted the Act in 1969 that coal miners did not have a disability benefit program under state workers compensation laws. 30 U.S.C. § 901(a).

For all the reasons stated above, the Court holds that the term "miner" in 30 U.S.C. § 902(d) does not include employees of railroads.

Furthermore, the Plaintiff railroads are not liable for Black Lung benefits unless they are "operators" within 30 U.S.C. § 802(d). The statute that covers liability for benefits, 30 U.S.C. § 932, provides that "operators" are liable for payment of benefits. 30 U.S.C. § 932(b) provides that "each such operator shall be liable for and shall secure the payment of benefits." 30 U.S.C. § 932(c) provides that "benefits shall be paid during such period by each such operator." 30 U.S.C. § 932(h) provides that the Secretary of Labor may provide for apportionment of liability for benefits "among more than one operator." It is true that 30 U.S.C. § 932(b) refers to an "employer other than an operator of a mine" in the context of securing the payment of benefits. However, such reference is apparently meant to distinguish between the two categories of "operators" included within 30 U.S.C. § 802(d). Under 30 U.S.C. § 802(d), an "operator" can be a person [1] who operates, controls or supervises a mine, or [2] who performs services or construction as an independent contractor at a mine. An "employer other than an operator of a mine" is a person who falls within category [2] of "operators" under 30 U.S.C. § 802(d), whereas "an operator of a mine" would be a person who falls within category [1] of "operators" under such statute. See Remarks of Representative Perkins, 124 Cong. Rec. p. H1029. The reference to "an employer other than an operator of a mine" in 30 U.S.C. § 932(b) does not detract from the fact that § 932 contemplates that only "operators" are liable for Black Lung benefits.

An "operator" must, by definition under 30 U.S.C. § 802(d), be involved in work "at" a coal mine, or must control or supervise a coal mine. A "coal mine" includes facilities or other properties used for extracting coal or preparing coal so extracted. 30 U.S.C. § 802(h)(1). A railroad obviously does not extract coal, nor does the work done by a railroad in connection with transporting coal fall within the definition of "work of preparing the coal" set forth in 30 U.S.C. § 802(i). Congress has said that "operators" are liable for benefits, and it is clear that Congress intended this liability to be borne by the coal industry and not any other industry. *National Independent Coal Operators Association* v. *Brennan*, 372 F.Supp. 16 (D. D.C. 1974). For all these reasons, the Court holds that a railroad is not an "operator" within the meaning of 30 U.S.C. § 802(d).

Finally, Plaintiff railroads have contended that it would be unconstitutional to apply the Act to them, because they were not given fair notice that the Act would be applied to them and they were not given an equal opportunity to secure the payment of benefits as was the coal mining industry. The Plaintiff railroads have also contended that application to them of the presumptions contained in 30 U.S.C. § 921(c) would deny them due process of law, because there is no rational basis for the application of those presumptions to railroad employees. These arguments may have merit, but there are sufficient non-constitutional grounds for deciding this case, so the Court should not and does not reach the constitutional questions. *Dawson* v. *Myers*, 622 F.2d 1204 (9th Cir. 1980).

The foregoing shall constitute the Court's findings of fact and conclusions of law. The Court will enter judgment in favor of the Plaintiffs and against the Defendants. Counsel for the

Plaintiffs will tender a judgment in conformity with the foregoing findings and conclusions.

Date 10/5/81

/s/ James F. Gordon
JAMES F. GORDON
SENIOR UNITED STATES DISTRICT JUDGE

Copies to:
Counsel of record.

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No.
80-0611-L(G)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs,

vs.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants.

FINAL JUDGMENT

In accordance with the Court's Memorandum Opinion entered herein on October 6, 1981, judgment shall be, and hereby is, entered in favor of the Plaintiffs, Louisville and Nashville Railroad Company, Southern Railway Company, Norfolk and Western Railway Company, The Chesapeake and Ohio Railway Company, The Baltimore and Ohio Railroad Company, The Clinchfield Railroad, Missouri Pacific Railroad Company, Illinois Central Gulf Railroad Company, Union Pacific Railroad, The Cincinnati, New Orleans and Texas Pacific Railroad Company, The Alabama Great Southern Railroad Company, Norfolk Southern Railway Company, Interstate Railroad Company, New River Railroad Company, and Richard B. Ogilvie, Trustee of the Property of Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor, as follows:

1. The motion for summary judgment filed by the Plaintiffs is granted.

2. The motion for summary judgment filed by the Defendants is denied.

3. It is adjudged and declared by the Court:

[a] That the term "miner," as defined in 30 USC § 902(d) of the Federal Coal Mine Health and Safety Act, as Amended by the Black Lung Benefits Act of 1972, and the Black Lung Benefits Reform Act of 1977, hereinafter collectively referred to as the BLBA, does not include employees of the plaintiff railroads while engaged in work for the plaintiff railroads.

[b] That the railroad tracks and facilities employed by the plaintiff railroads to receive, transport, and deliver coal are not coal mines, coal transportaation, or coal preparation facilities within the meaning of 30 USC § 802(h) and § 803 of the BLBA.

[c] That the plaintiff railroads are not coal mine operators or other employers within the meaning of the BLBA, while engaged in the receipt, transportation and delivery of coal, and may not be adjudged liable for the payment or reimbursement of BLBA benefits under 30 USC § 932 and § 934.

4. The defendants, Raymond J. Donovan, Secretary of Labor and Trustee of the Black Lung Disability Trust Fund, the Department of Labor, Richard S. Schweiker, Secretary of Health and Human Services (and the Department of Health and Human Services), and Donald T. Regan, Secretary of the Treasury, and the Department of Treasury, and each of them, and their successors in office, and all persons holding or claiming by, through, or in privity to each of said defendants, or any persons charged by law to administer or enforce the provisions of the BLBA, and having notice of this Judgment, are permanently enjoined from applying the BLBA to railroad employees, or former employees, or railroads, for reasons set forth in the Memorandum Opinion of this Court, and from applying the BLBA so as to find railroad employees, or former employees eligible for benefits thereunder as a result of their employment by the plaintiff railroads; and said defendants and each of them, their successors in office, and all persons holding or claiming by, through, or in privity to each of said defendants, or any person charged by law to administer or enforce the provi-

sions of the BLBA, and having notice of this Judgment, are further permanently enjoined from taking any administrative position, or adopting any administrative policy, or making any administrative determination or adjudication to the effect:

[a] That the term "miner" as defined in 30 USC § 902(d) of the BLBA, includes employees of the plaintiff railroads while engaged in employment for the plaintiff railroads.

[b] That the railroad tracks and facilities employed by the plaintiff railroads to receive, transport, and deliver coal are coal mines, coal transportation or coal preparation facilities within the meaning of 30 USC § 802(h) and § 803 of the BLBA.

[c] That the plaintiff railroads are coal mine operators or other employers within the meaning of the BLBA while engaged in the receipt, transportation, and delivery of coal and may be adjudged liable for the payment or reimbursement of BLBA benefits under 30 USC § 932 and 934.

5. This is a final Judgment.

Date 11-2-81

/s/ James F. Gordon
JAMES F. GORDON
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

NO. C80-0611-L(G)

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,
Plaintiffs,

VS.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,
Defendants.

ORDER

The Motion of the defendants for a reconsideration of the Judgment entered November 3, 1981, having come before the Court, and the Court being sufficiently advised, it is hereby ORDERED that the Motion of the defendants be and hereby is overruled.

Entered this 12th day of January, 1982.

/s/ James F. Gordon
JAMES F. GORDON
JUDGE, UNITED STATES
DISTRICT COURT

APPENDIX G

Section 402(d) of the Black Lung Benefits Act, 30 U.S.C. § 902(d), as amended, provides:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment.[*]

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 921, as amended, provides:

> (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b)(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.
>
> (2) For the purpose of carrying out its functions under this chapter, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

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* S. 1538, as reported by the Senate Committee on Human Resources, S. Rep. No. 95-209, 95th Cong., 1st Sess. 34 (1977), would have amended Section 402(d) to provide as follows:

> The term "miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal. Such term also includes an individual who works or has worked in coal mine construction during any period such individual was exposed to coal dust in his or her employment.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 418 of this title.

APPENDIX H

U.S. DEPARTMENT OF LABOR
Employment Standards Administration

Office of Workers' Compensation Programs
Washington, DC 20210
Division of Coal Mine Workers' Compensation

RELEASE—REVISED CHAPTER 2-600 DEFINITION OF A COAL MINER PART 2, CLAIMS, COAL MINE (BLBA) PROCEDURE MANUAL

BLBA TRANSMITTAL NO. 81-3 February 25, 1981

EXPLANATION OF MATERIAL TRANSMITTED:

This revision provides changes in interpretation of the definition of a coal miner working in the transportation of coal.

James R. Yocon
JAMES R. YOCON
Associate Director for
Coal Mine Workers' Compensation

FILING INSTRUCTONS:

Remove Old Pages			Insert New Pages		
Part	Chapter	Pages	Part	Chapter	Pages
2	2-600	i 1-9	2	2-600	i 1-10

File this Transmittal Sheet behind the Checklist in the front of the Coal Mine (BLBA) Procedure Manual.

Distribution: List No. 3
(All Supervisors and Claims Examiners)

TABLE OF CONTENTS

1. *Definition of a Coal Miner.* This chapter gives the guidelines for determining if a claimant or an individual on whose record a claim is filed is or was a coal miner within the meaning of the Act.

2. *Authority.* BLBA Section 402(d); 20 CFR 725.101(a)(26), and 725.202.

3. *Policy.* Coverage by the BLBA is limited to coal miners and their eligible survivors. Upon receipt of a timely, valid application, the DC first determines the eligibility of the claimant under this criterion. Claimants who are not or were not coal miners nor the survivors of coal miners, do not have benefits of rights and protections of the BLBA (except administrative remedies of appeal of adverse decisions). The requirements for coverage under the BLBA are defined to ensure compensation of all eligible claimants. The applicable regulations provide multiple, overlapping criteria for determinations of covered employment and are intended to cover all eligible persons under one or more criteria. The area of the definition of a miner is the source of intensive litigation and guidelines in this chapter should be interpreted flexibly and are subject to change. In each case, the DC should develop all relevant evidence prior to decision.

4. *Definitions.*

a. *Coal Mine* means an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted and includes custom coal preparation facilities.

b. *Underground Coal Mine* means a coal mine in which the earth and other materials which lie above and around the natural deposit of coal (i.e., overburden) are not removed in mining; including all land, structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, appurtenant thereto.

c. *Coal Preparation* means the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine.

d. The term "Miner" means any individual who works or has worked in or around a coal mine or coal preparation facility in the process of extracting coal or preparing the coal so extracted, including persons engaged in functions involving the extraction, preparation or transportation of coal, and persons who work or have worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility.

5. *References.* 20 CFR 725.491-725.493.

6. *Responsibilities.*

a. *The Deputy Commissioner (DC)* assigned jurisdiction in a particular claim, and such claims examiners as he or she may designate, are responsible for initial findings and initial determinations on the claimant's eligibility as a miner or the survivor of a miner. The DC is responsible for developing sufficient evidence for a decision in each case.

b. *The Claimant* is responsible for submitting the evidence necessary to show that he/she is a miner or the eligible survivor of a miner.

7. *Definition of Coal Miner-General Requirements.* The definition of a coal miner in the Regulations prescribes a two-step test of coverage, based upon the *location* and *function* of work; i.e., us claimant performing the type of work which is necessary to extractionb or preparation process.

a. *Location.* For an individual to qualify as a miner, he/she must be engaged in covered work in or around a coal mine or coal preparation facility. The phrase "in or

around a coal mine or coal preparation facility" includes, in addition to coal mines and coal preparation plants, the mine or preparation plant offices, storehouses, and repair facilities located on or adjacent to or in the vicinity of the mine property, access roads, refuse banks or dumps resulting from the extraction and/or processing or coal at the site, located on or near the mine property, and may extend to structures and facilities located at some distance from the actual place of extraction or preparation, provided such structures or facilities are used in the extraction or preparation of coal or are intended to be used in or result from such processes (see paragraph 9 below).

b. *Function.* The regulations recognize five broad categories as "types" of work which may be covered under the Act: extraction of coal; preparation of coal; transportation of coal; and coal mine maintenance and construction. In each instance, coverage extends to those persons whose tasks are performed prior to the entry of the coal into the stream of commerce. This includes workers directly performing the work, workers performing the necessary support functions, and workers performing work which bears a reasonable and necessary relationship to the overall process in which the workers are engaged in each of the five categories above.

8. *Determining Covered Types of Work.* In determining covered work, the following guidelines are applied:

a. *Extraction* covers the process of removing coal from its natural deposits in the earth, including necessary support functions. Thus, certain individuals whose work may involve transportation of coal (such as motormen or shuttle car operators) or construction in a coal mine (such as bratticemen or masons) are classed as workers in extraction because they perform necessary support functions.

b. *Preparation.* The Regulations define "preparation" as nine processes: breaking, crushing, sizing, cleaning, washing, drying, mixing, storing, and loading; together with such other work of preparation as is usually performed by the operator of a coal mine. When the words "preparation" or "preparing" are used in the statute, they refer to the accepted trade descriptions of basic preshipment coal processing operations generally performed by the coal mine operator at the tipple or breaker. Inde-

pendent breakers or preparation plants, which are not associated with any mine but purchase mined coal for processing, are coal preparation facilities within the meaning of the law and their employees are miners. The term "custom coal preparation facilities" generally refers to standard coal preparation operations performed by an entity other than the operator, at the operator's or customer's specification or order, regardless of whether such activities are performed on or off the coal mine site. Congress did not intend to include within the scope of the term "custom coal preparation facilities" processes performed by a consumer of the coal. In cases where coverage is conditional on a showing that a preparation process was "usually performed by a coal mine operator," the evidence should show that the process was customary in the mines of a particular area, or in mines of a certain size or production capacity in the region or coal field where the individual worked.

c. *Maintenance* includes maintenance of coal mining or coal preparation facilities, machinery, and equipment.

d. *Transportation* of coal includes the transportation of coal usually performed by a coal mine operator, transportation from extraction site to preparation plant or tipple, and any transportation of coal up to the time when the extraction and preparation of the coal has been completed or the time when the extracted coal enters into the stream of commerce. Thus, persons engaged in transportation of coal from a mine site to the ultimate consumer of the coal, or in functions integral to that activity, would not be covered, even if part of their time is spent in or around the mine site. However, those engaged in transport functions between the extraction site and the tipple would be covered where their work is integral or necessary to the preparation or extraction process.

e. *Construction* refers to the construction of facilities used in or to be used in the extraction and preparation of coal.

9. *Location Requirement.*

a. To establish eligibility, workers in covered occupations must work in or around a coal mine or coal preparation facility. Under the Federal Coal Mine Health and Safety Act of 1969, as amended, a miner was defined "a

person who is or was employed in a coal mine." The expanded definition in the BLBA considerably modifies the location requirement of the definition by the insertion of "or around."

b. "Or around" extends coverage to facilities which are not located on the actual property of the mine or preparation plant but which are directly involved in the overall process of coal mining, from the extraction to the preparation and loading of the coal (including construction, maintenance, and transportation). This should not be construed to require contiguity, but the facility or area must be located in the vicinity of the mine which it serves and must be directly involved in one or more the covered occupations including necessary support functions.

c. The regulations recognize coverage of off-site transportation or maintenance facilities in that, while such facilities may be covered by a liberal application of the definition of a coal mine, the terms "mine or mines or other facilities," "mine or preparation or transportation facility," and "coal mine or coal preparation or transportation facility" are used in the definition of coal mine operator (20 CFR 725.491). Accordingly, the BLBA covers not only the structures and facilities located on the mine or preparation plant property, but also directly-related transportation and other facilities which are located adjacent to or in the vicinity of the mine or preparation plant property and which are essential to, or form an integral part of the overall mining process, i.e., the process which occurs prior to the time of shipment to the ultimate consumer.

d. See paragraph 15 below for effect of dust exposure standards on determination of coverage.

10. *Examples of Coverage and Non-Coverage Under the Act.*

a. A claimant employed by a railroad works as a brakeman and conductor on trains which deliver empty coal cars to the tipple and take loaded coal cars from the tipple to nearby yards for further shipment. The claimant *is not* a miner. Although he performed his work "around" a coal mine, his work occurred after the preparation and extraction process was completed and does not constitute the

type of function included in the broad category of "transportation" within the meaning of the Act.

b. An employee who worked as a molder in a foundry shop for molding machinery parts for use in adjacent coal mines operated by the employer, who occasionally entered the coal mines to repair equipment, was a covered miner by virtue of that work, since it bore a reasonable and necessary relationship to the overall coal mining process.

c. A claimant employed by a railroad company to maintain track between the extraction site and tipple, and a truck driver who hauls coal from the extraction site to the tipple are both "miners" under the Act. Both are employed in or around a mine site and both perform functions necessary to the process of extraction and/or preparation of the coal.

d. A claimant who is employed by a railroad company repairing and inspecting coal cars at yards near the tipple, who does emergency repair work on the cars at the tipple itself is not a miner. Although his work is necessary to the extraction or preparation process but rather to the job of transporting the prepared coal to the ultimate consumer.

e. A claimant who is employed by a railraod company as a conductor on trains which pick up raw, unprocessed coal at a coal mine and carry it to a preparation facility where it will be processed for sale to consumers is a miner. He is employed at a coal mine or custom coal preparation facility (see section 8(b)), and his work is integral or necessary to the preparation of the coal before its entry into the stream of commerce. However, if the coal was processed by a company for *its own* consumption, the claimant, who was a conductor or on trains carrying the raw coal to the company, would not be a miner since his work did not facilitate the preparation of coal for entry into the stream of commerce.

f. A transportation worker who picks up raw coal from the mine site and transports it for use by a company or individual in its present form (other than a coal preparation facility) is not a miner due to the fact that at the time this raw coal was picked up it went into the stream of commerce and can no longer be considered to be within the extraction or preparation of coal function.

g./ Facilities which change the form of coal (e.g., power plant, gasification plant, etc.) are considered to be the ultimate consumers of coal, even though their product is consumed by another party. As such, employees at these facilities are not coal miners nor are those workers who transport the coal to these facilities.

11. *Non-Covered Employment.* 20 CFR 718.301(b) prohibits the crediting of CME occurring outside the United States to qualify for benefit of the presumptions in Section 411(c) of the BLBA.

12. *Development of Evidence for Determination of Coverage.* Each claim received by the DCMWC is first reviewed to determine if the alleged miner in fact meets the definition contained in the law. If the information contained in the application indicates that the alleged miner meets the definition, the case is processed under normal procedures (BLBA PM 2-300). If the information is insufficient but the application indicates that the alleged miner may have worked in or around a coal mine or coal preparation facility, develop the case under the guidelines in paragraph 13 below. If the claimant never worked in or around a coal mine follow the procedures in paragraph 14 below.

13. *Development of Claims Where Employment In or Around a Coal Mine is Alleged.* Where the claimant has alleged employment in or around a coal mine, evidence on possible coverage should be developed in the following manner:

a. *Contact the Claimant* (See exhibits 1, 2, and 3 for examples of questionnaire) and the claimant's or alleged miner's employer, and any other source, for *detailed* information on the following points:

(1) Complete work history;

(2) employment status;

(3) job classification(s);

(4) specific job duties described in detail;

(5) job location(s) for each job duty;

(6) for transportation workers, the nature of coal being transported, including details covering the origin and destination of the coal;

(7) exposure to dust;

(8) potential responsible operator(s) or other employers; and

(9) any other information which may be useful in making a determination.

b. *Concurrently, Notify the Potential RO* with Form CM-971a (Exhibit 4), if the alleged employment is after December 31, 1969.

c. *Advise the Claimant* to submit any medical evidence the claimant wishes to be considered (medical examinations will not be scheduled unless the claimant is determined to meet the Act's definition). Any potential RO may request a medical examination and develop its own evidence.

d. On the basis of the complete body of evidence developed in each case, make an initial finding on the employment issue.

e. If the claimant or alleged miner clearly meets the Act's definition, proceed with normal development.

f. If the evidence shows the claimant does not qualify under the definition make an initial finding of non-entitlement, using Form Letter CM-1065 (Exhibit 5).

(Further processing of the claim will be in accordance with regular procedures.)

14. *Processing of Claims Where No CME is Alleged.* Where the complete employment history (Form CM-911a, Exhibit 6) alleges no employment which may qualify as coal mine work, an initial finding of non-entitlement will be made using Form CM-1065, Informal Denial Letter (Exhibit 5). If a complete employment history is not available with the application, it will be necessary to obtain this information from the

claimant. If further proceedings are requested, procedures are as follows:

a. *Pre-1970 Employment.* The claimant should be advised to submit all evidence he/she wishes to have considered, including medical evidence. The CE should obtain a detailed description of the alleged covered employment from the claimant, and any available information from the former employer.

b. *Post-1970 Employment.* The CE should notify the potential RO, using the procedures in BLBA PM 2-801, affording all parties a reasonable time to submit evidence in support of their positions.

c. *Referral for Further Adjudication.* When the case has been fully developed, it is forwarded to the Branch of Pre-Hearing and Review under the procedures in BLBA PM 2-1500. If the claimant fails to submit the evidence necessary for an initial finding, the DC may proceed to declare the claim abandoned in accordance with the procedures in BLBA PM 2-300.19.

15. *Controversion of Eligibility Based on Dust Exposure.* Once the claimant has made a prime facie showing that he/she was a coal miner or the eligible survivor of a miner, the case is processed on that basis (including the scheduling of medical examinations in a LM case). The factors considered are type of work and location of work. The claimant's entitlement may be contested by the operator, including controversion on issues of exposure to coal mine dust which do not affect the question of the claimant's basic coverage by the BLBA. The operator may attempt to defeat the claimant's entitlement on questions of exposure in other ways (note that dust exposure in coal mine employment is not limited to coal dust).

a. *Exposure Presumption in 20 CFR 725.202(a).* Coal mine construction workers and coal transportation workers are miners to the extent that they are employed in or around a coal mine or coal preparation facility in functions integral to the extraction or preparation process and that they are exposed to coal mine dust as a result of such work. There is a rebuttable presumption that an individual engaged in coal mine construction or coal transportation was

exposed to coal mine dust during all periods of employment occurring in or around a coal mine or coal preparation plant. This presumption can be rebutted by evidence which shows the individual (1) was not regularly employed in or around a coal mine or coal preparation plant, or (2) was not regularly exposed to coal mine dust in the course of such employment. Evidence submitted by the operator showing that the miner was employed in or around a coal mine or coal preparation facility for less than 125 days in all applicable twelve-month periods (BLBA PM 2-700) is sufficient to show that the miner was not regularly employed in or around a coal mine of coal preparation facility.

b. *Operator Presumption in 20 CFR 725.492(c).* For the purposes of determining whether an employer is or was an operator or other employer covered by the Act which may be found liable for payment of benefits to an employee of such employer, there is a rebuttable presumption that during the course of an individual's employment, such individual was regularly and continuously exposed to dust during the course of employment. This presumption may be rebutted by a showing that the employee was not regularly and continuously exposed to coal dust periods during such employment.

APPENDIX I

List Of Parents, Subsidiaries And Affiliates Of Petitioners, Pursuant To Sup. Ct. R. 28.1

The Chesapeake and Ohio Railway Company is wholly owned by CSX Corporation and C&O owns most of the stock of the Baltimore and Ohio Railroad Company. A list of affiliates or subsidiary companies appears as Attachment 1.

The Seaboard System Railroad, Inc., formed by the merger of the Louisville and Nashville Railroad Company, an appellee below, into Seaboard Coast Line Railroad, Inc., is wholly owned by CSX Corporation. Under the name Clinchfield Railroad, Seaboard System Railroad, Inc. operates properties leased from the Carolina, Clinchfield and Ohio Railroad Company, which is wholly owned by CSX. A list of affiliates or subsidiary companies appears as Attachment 2.

The Union Pacific Railroad Company is wholly owned by Union Pacific Corporation. A list of affiliates or subsidiary companies appears as Attachment 3.

The Missouri Pacific Railroad Company is wholly owned by the Missouri Pacific Corporation, which is wholly owned by Union Pacific Corporation. A list of affiliates or subsidiary companies appears as Attachment 4.

Illinois Central Gulf Railroad Company is wholly owned by Illinois Central Industries, Inc. A list of affiliates or subsidiary companies appears as Attachment 5.

Richard B. Ogilvie is Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which is under reorganization. Prior to the reorganization proceedings, Chicago, Milwaukee Corporation was the parent of the railroad, owning most of its common and preferred stock.

ATTACHMENT 1

Petitioners: Baltimore and Ohio Railroad Company and Chesapeake and Ohio Railway Company

Related companies:

Adrian Realty Co.
Baltimore and Ohio Chicago Terminal Railroad Co., The
Baltimore Ohio Connecting Railroad Co., The
Baltimore and Ohio Warehouse Co., The
Baltimore and Philadelphia Railroad Co., The
B&O Transportation Co., The
Baltimore Belt Railroad Co., The
Buffalo, Rochester and Pittsburgh Railway Co.
Centralia and Webster Springs Railroad Co.
Cheat Haven and Bruceton Railroad Co.
Cheat Haven Railroad Co., The
Chesapeake and Curtis Bay Railroad Co., The
Chessie Corp., The
Chessie Motor Express, Inc.
Chessie Realty, Inc.
Chicago South Shore and South Bend Railroad
Cincinnati, Indianapolis & Western Railroad Co., The
Cleveland Terminal & Valley Railroad Co., The
Covington and Cincinnati Elevated Railroad and Transfer and Bridge Co., The
Curtis Bay Railroad Co.
Dayton and Michigan Railroad Co.
Dayton and Union Railway Co., The
Fairfax Realty Co.
Fairmont, Morgantown and Pittsburgh Railroad Co.
Fruit Growers Express Co.
Kanawha-Ohio Corp.
Lake Erie and Detroit River Railway Co., The
Lancaster, Cecil and Southern Railroad Co., The
Maryland and West Virginia Co.
Maryland Construction Co. Baltimore City
Metropolitan Southern Railroad Co.

Philadelphia Perishable Products Terminal Co., The
Railease, Inc.
Real Estate and Improvement Company of Baltimore City, The
Richmond-Washington Co.
Schuylkill Improvement Land Co. of Philadelphia, The
Staten Island Railroad Corp., The
Terminal Realty Baltimore Co.
Toledo, Lorain & Fairport Co.
Toledo Ore Railroad Company, The
Toledo Terminal Railroad Co., The
Washington and Western Maryland Railroad Co.
Washington County Railroad Co.
West Virginia and Pittsburgh Railroad Co.
Western Maryland Railway Co.
Western Maryland Truck Lines, Inc.
Western Maryland Warehouse Co.
Winchester and Potomac Railroad Co., The
Winchester and Strasburg Railroad Co., The

ATTACHMENT 2

Petitioner: Seaboard System Railroad, Inc.

Related companies:

Atlantic and West Point Rail Road *Company*
Atlantic Land and Improvement Company, The
Beaver Street Tower Company
Carrollton Railroad Company, The
Central Transfer Railroad and Storage
Chatham Terminal Company
Chicago and Indianapolis Coal Company, Inc.
Clinchfield Railroad Company
Columbia, Newberry and Laurens Railroad Company
Cybernetics & Systems, Inc.
Duval Connecting Railroad Company
Evansville Connecting Railroad Company
Florida Publishing Company
Fort Myers Southern Railroad Company
Fruit Growers Express Company
Gainesville Midland Railroad Company
Georgia Railroad
Haysi Railroad Company
Hish Point Thomasville & Denton Railroad Company
Holston Land Company, Inc.
Houston - McCord Realty Company
Kentucky Central Railway Company
L&N Investment Corporation
Louisville, Henderson & St. Louis Railway Company
Monon Coal Company, Inc.
Monon Realty Company, Inc.
Monon Transportation Corporation
Nashville and Decatur Railroad Company
North Bank Development Company
North Charleston Terminal Company
Richmond-Washington Company
Savannah River Terminal Company
Seaboard Coast Line Railway Supplies, Inc.

Seaboard Tampa Investment Corporation
Seacoast Transportation Company, The
South Carolina Pacific Railway Company
Tallon Properties
Tampa Southern Railroad Company
Washington Land Company
Western Railway of Alabama, The
Winston-Salem Southbound Railway

ATTACHMENT 3

Petitioner: Union Pacific Railroad Company

Related companies:

Bitter Creek Coal Company
Calnev Pipe Line Company
Camas Prairie Railroad Company
Champlin Gas Pipeline, Inc.
Champlin Gas Processing Company
Champlin Indonesia, Inc.
Champlin International Petroleum Company
Champlin Peru, Inc.
Champlin Petrochemicals, Inc.
Champlin Petroleum Company
Champlin Philippines, Inc.
Champlin Pipeline, Inc.
Champlin Trading Company
Denver Union Terminal Railway Company, The
Des Chutes Railroad Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Harbor Service Stations, Inc.
Kanda Development Company
Kansas City Terminal Railway Company
Longview Switching Company
Los Angeles & Salt Lake Railroad Company
Mount Hood Railway Company
Ogden Union Railway and Depot Company, The
Oregon Short Line Railroad Company
Oregon-Washington Railroad & Navigation Company
Pacific Rail System, Inc.
Pacific Subsidiary, Inc.
Portland Terminal Railroad Company
Portland Traction Company
Prospect Point Coal Company
Rock Springs Royalty Company
Rocky Mountain Energy Company

Separation Creek Coal Company
Spokane International Railroad Company
St. Joseph and Grand Island Railway Company, The
St. Joseph Terminal Railroad Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Foundation
Union Pacific Fruit Express Company
Union Pacific Land Resources Corporation
Union Pacific Railroad Company
Union Pacific Resources Corporation
Union Pacific Resources Ltd.
Union Subsidiary, Inc.
UP Leasing Corporation
UP Subsidiary Corporation
Upland Industries Corporation
Wasatch Insurance Limited
Winton Coal Company
Yakima Valley Transportation Company

ATTACHMENT 4

Petitioner: Missouri Pacific Railroad Company

Related companies:

Abilene & Southern Railway Company
Alton & Southern Railway Company, The
American Refrigerator Transit Company
Arkansas & Memphis Railway Bridge and Terminal Company
Belt Railway of Chicago
Brownsville & Matamoros Bridge Company
Chicago & Western Indiana Railway Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railway
Galveston, Houston and Henderson Railroad Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Illinois Terminal Railroad Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Mississippi River Transmission Company
Missouri Improvement Company
Missouri Pacific Airfreight, Inc.
Missouri Pacific Equipment Corp.
Missouri Pacific Intermodal Transport, Inc.
Missouri Pacific Truck Lines, Inc.
MRT Exploration Company
Park Spring, Inc.
Pueblo Union Depot and Railroad Company, The
Ric-Con Corporation
Southern Illinois and Missouri Bridge Company
Stonegate Park, Inc.
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company
Weatherford Mineral Wells and Northwestern Railway Co., The

ATTACHMENT 5

Petitioner: Illinois Central Gulf Railroad Company

Related companies:

Abex A/S
Abex Corporation
Abex Denison Limited
Abex Engineered Products Limited
Abex Ges. m.g.H.
Abex G.m.B.H.
Abex Industrial, S.A.
Abex Industries, A.B.
Abex Industries Ltd.
Abex Industries, S.A.
Abex International Holdings, Limited
Abex International, S.A.
Abex Mead, Limited
Abex Pagid Equipment S.A.
Abex Pagid Reibbelag G.m.b.H.
Abex S.A.
Almacenes Refrigerantes S. A. Oe C.V.
Alton Manufacturing Company
American Brake Shoe Company
American Refrigeraction De Centro America, S.A.
Amsco Italinana S.p.A.
Amsco Mexicana S.A.
Au Gourmet Foods De Luxe, Inc.
Belt Railway Company of Chicago, The
Bent Creek Development Co.
Black Body Corporation
Black Diamond, Inc.
Blue Island Railroad Company
Bolingbrook 55 Corp.
Bolingbrook Plaza, Inc.
Bridgewater Machine Company
Bubble-Up Company, Inc.
Butcher Boy Refrigerator Door Co.
Centigon, Inc.

Central Sub, Inc.
Chandeysson Electric Company
Chesley Industries, Inc.
Chicago Bank of Commerce, The
Chicago Community Ventures, Inc.
Chicago & Illinois Western Railroad Company
Chicago Intermodal Company
Compagnie pour l'Industrie Amiantiere
Compet Corporation
Cosmic Enterprises, Inc.
Cosmic Stores, Inc.
Cove Development Corporation
Covex S.r.L.
Cypress Bend Corporation
Dad's Root Beer Company
Danville Pepsi-Cola Bottling Co.
Dearborn Park Corporation
Denison Hydraulics Company, The
Denison Hydraulics India Limited
Denison Hydraulics, Japan Ltd.
Deri (Engineers) Limited
Endro, Inc.
Environ of Inverrary, Inc.
436 Corporation
Frendo-Abex S.p.A.
Fren-Do France S.A.
Fren-Do Sud S.p.A.
Gas Welding, Inc.
Genadco Advertising Agency, Inc.
GM&O Land Company
Gulf Transport Company
H. F. Philipsborn & Co.
Haleyville Tubes, Inc.
Helvetia Leasing Corporation
Helvetia Milk Condensing Company, Inc.
Helvetia Properties, Inc.
Helvetia Redevelopment Corporation
Hi-Q Products Company

Hussmann Acceptance Co.
Hussmann Acceptance Co. Canada Limited
Hussmann Food Store Equipment Limited
Hussman International Sales, Inc.
Hussmann (Pty) Limited
Hussman Ontario Sales, Ltd.
Hussmann Refrigeration, Inc.
Hussmann Refrigerator Co.
Hussmann Store Equipment, Ltd.
Huth Manufacturing Corporation
IC Equipment Leasing Co.
IC Industries, Inc.
IC Industries Finance Corporation, N.V.
IC Industries Insurance Co. Ltd.
IC Leasing, Inc.
IC Products Company
IC Sub, Inc.
Iconic, Inc.
Illinois Center Corporation
Illinois Central Export Corporation
Illinois Terminal Railroad Company
Indiana Trailer Supply, Inc.
International Parts Corporation
International Parts Manufacturing, Ltd.
International Parts, Ltd.
International Stamping Company, Inc.
Jefferson Southwestern Railroad Company
Joliet Union Depot Company
Kansas City Terminal Railway Company
Ken-Craft Products, Inc.
Kensington and Eastern RR Co.
Kentuckiana Bottlers, Inc.
Kolmer Products Corporation
Krack Corporation
Krack Corporation International
Lake Winds Development Co.
LaSalle Properties, Inc.
Laura Scudder's, Inc.

Le Silencieux, S.A.
Lincoln Financial, Inc.
Lloyds Abex Limited
Lloyds (Burton) Ltd.
Merchants Realty Company of Alabama
Merchants Refrigerating Company
Merchants Refrigerating Company of California
Micas-M.T.M. Australia Pty. Ltd.
Mid-America Improvement Corporation
Midas International Corporation
Midas Muffler (Vic.) Pty., Limited
Midas Properties, Inc.
Midas Realty Corporation
Midas Realty Corporation of Canada
Midas S.A.
Midas Silencers, Ltd.
Midas Steel Processing Services, Inc.
Midas-Euro., Inc.
Milady Foods, Inc.
Mississippi Export Railroad Company
Mississippi Valley Corporation
Mohawk Cabinet Co., Inc.
Muffler Corporation of America
New Orleans Great Northern Ry. Co.
Nine-O-Five Stores, Inc.
905 Wine and Spirits, Inc.
Norris Homes, Inc.
Oak Village Development Corp.
Old Brazos Forge, Inc.
1-2-3, Inc.
Paducah & Illinois Railroad Company
Parrish Bakeries, Inc.
Parmaco Products, Ltd.
Peoples Liquor, Inc.
Peoria and Pekin Union Railway Company
Pepsi-Cola Bottling Company of Cincinnati
Pepsi-Cola Bottling Company of Kenosha and Racine, Inc.
Pepsi-Cola General Bottlers, Inc.

Pepsi-Cola Kantor Bottling, Inc.
Pet Consolidated Limited
Pet Incorporated (Delaware)
Pet Incorporated (Wyoming)
Pet International Sales, Inc.
Pet Milk Company
Petsub, Inc.
Philipsborn Equities, Inc. (Del.)
Philipsborn Equities of Texas, Inc.
Port 400 Holding Company
Pullman Company, The
Royton Holdings (Pty) Ltd.
S.A. Ateliers Set Fonderies B. Piret
S&T of Mississippi, Inc.
S&T South, Inc.
St. Louis Lithographing Company
Seay & Thomas of Florida, Inc.
Signal-Stat Corporation
Societa Italiana per l'Amianto S.p.A.
South Chicago Railroad Co., The
South Properties, Inc.
Southland Canning & Packing Co., Inc.
Stanray Corporation
Star Cooler Corporation
Stephen F. Whitman & Son, Inc.
Stuckey's, Inc.
Stuckey's Stores, Inc.
Sundaram-Abex Limited
Terminal Railroad Association of St. Louis
Trailer Train Company
Uni-Abex Alloy Products Limited
Valley Potato Company
Vendome Stores, Inc.
Violet Packing Co., Inc.
Waterloo Railroad Company
Winebrenner Corporation, The
Wolff Farm Supply Company

No. 83-1040

In the Supreme Court of the United States

OCTOBER TERM, 1983

SEABOARD SYSTEM RAILROAD, INC., ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the administrative and judicial review procedures established by the Black Lung Benefits Act of 1972, 30 U.S.C. (& Supp. V) 901 *et seq.*, are exclusive, and thus preclude a district court from assuming jurisdiction over a challenge to a Department of Labor internal agency guideline as to the Act's coverage of particular employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-12a) is reported at 713 F.2d 1243. The opinion of the district court (Pet. App. 14a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1983. A petition for rehearing was denied on September 28, 1983 (Pet. App. 13a). The petition for a writ of certiorari was filed on December 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act of 1972 (BLBA), 30 U.S.C. (& Supp. V) 901 *et seq.*, provides benefits to miners who are totally disabled by pneumoconiosis (black lung disease) and to the survivors of miners whose deaths were

due to the disease or who were totally disabled by the disease at the time of their deaths. 30 U.S.C. (& Supp. V) 901, 921, 931. The Act establishes administrative and judicial procedures for review of black lung benefit eligibility determinations (30 U.S.C. (Supp. V) 932(a), incorporating 33 U.S.C. (& Supp. V) 919, 921) and authorizes the Secretary of Labor to promulgate such regulations as he deems necessary in administering the black lung benefit program. 30 U.S.C. (Supp. V) 932(a).

Under the Secretary's regulations applicable to claims filed after July 1, 1973, a deputy commissioner makes an informal determination regarding eligibility for benefits; any party dissatisfied with that determination may receive a formal hearing before an administrative law judge. 20 C.F.R. 725.410 *et seq.* Any party in interest may appeal the administrative law judge's decision to the Benefits Review Board, which is authorized to decide "substantial question[s] of law or fact"; any person adversely affected by a final order of the Benefits Review Board may obtain review in the court of appeals for the circuit in which the injury occurred. 33 U.S.C. 921(b)(1), (3) and (c).

Pursuant to his general administrative authority, the Secretary has also issued internal agency guidelines for determining, among other things, coverage under the BLBA. The internal guideline challenged by petitioners concerns the applicability of the BLBA to those who transport coal in or around a coal mine, and provides that "those [persons] engaged in transport functions between the extraction site and the tipple would be covered where their work is integral or necessary to the preparation or extraction process" (Pet. App. 32a).

2. Petitioners are 15 railroads that transport coal in interstate commerce (Pet. App. 2a, 14a). They brought suit against the Secretary of Labor, the Secretary of the Treasury and the Secretary of Health and Human Services, Trustees of the Black Lung Disability Trust Fund (see 26 U.S.C.

9501(a)), in the United States District Court for the Western District of Kentucky,[1] seeking a declaratory judgment that, as a matter of law, railroads are not "operators" and railroad employees are not "miners" as those terms are defined by the BLBA (Pet. App. 3a, 14a).[2] Petitioners also sought an injunction preventing the Secretary of Labor from implementing the internal agency guideline for determining benefit eligibility because the guideline does not expressly exclude railroad employees from the BLBA's coverage.

The district court granted petitioners' motion for summary judgment (Pet. App. 14a-19a, 20a-22a). The court held that Congress did not intend to include either railroads or railroad employees within the BLBA's scope (*id.* at 16a-18a). In so holding, the court rejected respondents' argument that it was precluded from exercising jurisdiction over petitioners' claims because petitioners are required to utilize the BLBA's exclusive administrative and judicial review procedures set forth at 33 U.S.C. (& Supp. V) 919, 921 (Pet. App. 15a). The court found the BLBA's review provisions inapplicable, concluding that "this controversy presents purely legal issues involving the construction of a statute, and the pendency of over 700 claims for Black Lung benefits [by railroad employees] makes these issues fit for judicial decision" (Pet. App. 15a).

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[1]Petitioners claimed jurisdiction under 28 U.S.C. (& Supp. V) 1331, 1337, 1361 and 2201.

[2]An "operator" is "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." 30 U.S.C. (Supp. V) 802(d). A "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. Such term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. (Supp. V) 902(d).

3. The court of appeals vacated the district court's judgment for lack of subject matter jurisdiction (Pet. App. 2a-12a). Relying on *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), and *Compensation Department of District Five* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981), the court of appeals held that the district court could not exercise jurisdiction here because Congress has specifically designated the court of appeals as the forum for judicial review of agency action under the BLBA, and "the BLBA statutory scheme of review is exclusive" (Pet. App. 8a). In reaching this conclusion, the court noted the comprehensive nature of the statutory review procedure: the Benefits Review Board may determine questions of both law and fact and a party dissatisfied with a decision of the Board may obtain review in the appropriate court of appeals (*ibid.*). Moreover, the court recognized that the BLBA expressly invests the district courts with jurisdiction "only in two very narrow situations involving enforcement of compensation orders" (*ibid.*). Finally, the court found the statutory review procedure adequate to address and resolve petitioners' claims, and it rejected the argument that "exceptional circumstances" necessitated that the district court assert jurisdiction in this case (*id.* at 7a-12a).[3]

ARGUMENT

The court of appeals correctly applied well-settled principles regarding the exclusivity of statutory review procedures to the review provisions of the BLBA. The decision

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[3]Because the court of appeals found that the district court lacked jurisdiction, it did not rule on the substantive issues raised by petitioners. The court did, however, state that the statutory definition of operator "does not clearly exclude railroads" and that the legislative history of the BLBA indicates that "Congress expressly recognized that a person working in transportation in or around a coal mine might be exposed to coal dust as a result of such employment and should not be deprived of BLBA benefits merely because his employer is not an 'operator' in the traditional sense" (Pet. App. 9a, 12a).

below does not conflict with any decision of this Court or of another court of appeals. In fact, the decision is wholly in accord with the decision of the only other court of appeals that has addressed the question. *Compensation Department of District Five* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981).

In *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), this Court held that an order issued by the Federal Reserve Board after an administrative adjudication under the Bank Holding Company Act was reviewable only in the court of appeals pursuant to the direct review provisions of that statute. Accordingly, the Court concluded that the district court lacked jurisdiction to enjoin the Comptroller of the Currency from issuing a certificate of authority for the new bank. The Court pointed to a number of factors that supported the conclusion that Congress had intended the statutory review provisions to be exclusive. First, Congress had specifically rejected a proposal that would have permitted the type of review sought by the complaining parties. 379 U.S. at 420. Moreover, the Court stated that, like other statutory review procedures that the Court had found to be exclusive, the statutory review procedure at issue was "designed to permit agency expertise to be brought to bear on particular problems." *Ibid.* The Court observed that, where Congress has "enacted a specific statutory scheme for obtaining review, * * * the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Id.* at 422. Finally, the Court concluded that allowing deviations from the statutory scheme "would result in unnecessary duplication and conflicting litigation." *Ibid.* The decision in *Whitney* was in accord with prior decisions of this Court. See, *e.g.*, *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947);

Macauley v. *Waterman Steamship Corp.*, 327 U.S. 540 (1946); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938).

The court of appeals' decision in this case is completely in accord with the principles developed in *Whitney*, and with the Third Circuit's decision in *Compensation Department*.[4] In the latter case, the court applied the factors identified by this Court in *Whitney* in holding that the BLBA "scheme of review * * * was intended to be exclusive." 667 F.2d at 340. The court therefore concluded that a district court could not assert jurisdiction over a claim that the Secretary of Labor's practice of rereading x-rays of black lung claimants should be enjoined because it exceeded the Secretary's statutory authority.

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[4]Petitioners erroneously assert (Pet. 12-13) that the decision below conflicts with *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), rev'g 385 F. Supp. 424 (E.D. Ky. 1974), and *NICOA* v. *Usery*, 419 U.S. 955 (1975), aff'g 372 F.Supp. 16 (D. D.C. 1974), in which this Court reviewed district court decisions adjudicating constitutional challenges to the BLBA and to regulations promulgated thereunder. In neither *Turner Elkhorn* nor *NICOA* was the issue of the exclusivity of the BLBA's review procedure raised by the parties or addressed by the Court. Accordingly, there is no merit to petitioners' claim that these cases resolved the jurisdictional issue in petitioners' favor. See *Pennhurst State School & Hospital* v. *Halderman*, No. 81-2101 (Jan. 23, 1984), slip op. 28. Moreover, we note that *Turner Elkhorn* involved the Secretary of Labor's appeal to this Court from a district court judgment holding certain provisions of the BLBA unconstitutional. In those circumstances, this Court had jurisdiction over the appeal under 28 U.S.C. 1252 regardless of whether the district court properly asserted jurisdiction in the first instance. See *Williams* v. *Zbaraz*, 448 U.S. 358, 366-368 (1980); *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975). But cf. *California* v. *Grace Brethren Church*, 457 U.S. 393, 418-419 (1982). Furthermore, the Court in *NICOA* merely affirmed the district court's judgment summarily. The summary affirmance in that case provides no support for petitioners' jurisdictional argument because, as this Court has repeatedly stated, "although summary dispositions are decisions on the merits, the decisions extend only to " 'the precise issues presented and necessarily decided by those actions.' " *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 499 (1981) (plurality opinion)

In reaching a similar result here, the court below adopted the analysis of the Third Circuit in *Compensation Department* (see Pet. App. 6a). Under that approach, it is clear that "the BLBA statutory scheme of review is exclusive" (*id.* at 8a). To begin with, Congress implicitly acknowledged that the BLBA review procedure is exclusive by rejecting a proposed section of the BLBA that would have allowed claimants to seek review of benefits determinations in the district courts. See *Compensation Department*, 667 F.2d at 342 (citing H.R. Conf. Rep. 95-864, 95th Cong., lst Sess. 22-23 (1978)). In fact, Congress specifically granted the district courts jurisdiction only in a few narrow circumstances (Pet. App. 8a).[5] Moreover, the Benefits Review Board, which is composed of individuals with pertinent expertise, is particularly qualified to adjudicate the cases before it.

(quoting *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977)).

Petitioners' reliance (Pet. 15) on *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), is similarly misplaced. As the court of appeals observed (Pet. App. 7a):

> With respect to *Abbott Laboratories*, it is sufficient to note that the decision dealt exclusively with application of the APA and that Congress in enacting the BLBA expressly excluded the provision of the APA. 30 U.S.C. § 956. Moreover, later authority indicates that *Abbott Laboratories* "arguably assumed with little discussion that the APA is an independent grant of subject matter jurisdiction." *Califano* v. *Sanders*, 430 U.S. 90, 105 (1977). *Califano* determined that in fact the APA does not grant jurisdiction.

[5]Specifically, the district courts have jurisdiction to enforce both a compensation order making an award (33 U.S.C. 921(d)) and a lien against an operator who fails to make payments to the Black Lung Disability Trust Fund. 30 U.S.C. (& Supp. V) 934(b)(4)(A). Two courts of appeals have also recognized that the district courts have exclusive jurisdiction under 33 U.S.C. 918 to enforce orders declaring default in the payment of compensation. *Jones & Laughlin Steel Corp.* v. *Wertz*, 720 F.2d 324 (3d Cir. 1983); *Tidelands Marine Service* v. *Patterson*, 719 F.2d 126 (5th Cir. 1983).

"Allowing the BRB to pass initially upon important issues provides for a much greater likelihood of uniformity and effectiveness in the administration of the BLBA than would allowing actions to be brought in the various district courts throughout the country." *Compensation Department*, 667 F.2d at 342. In addition, "in providing for review of BRB determinations in the court of appeals, Congress in effect required * * * that a [party] exhaust all administrative remedies before seeking judicial review. There would have been little point in creating an entity such as the BRB if it could be circumvented at will by the bringing of an action in a district court against the Secretary." *Ibid.* Thus, "the same danger of duplicative and conflicting litigation" that this Court deplored in *Whitney* would be present if parties in a BLBA proceeding were permitted to bring suit in district court. *Compensation Department*, 667 F.2d at 342.[6]

Thus, there is no merit to petitioners' claim (Pet. 15) that the interests of efficiency "clearly justify" district court review. On the contrary, adherence to the statutory review procedure ensures review by a tribunal with far greater cumulative experience about arcane regulatory matters than a district judge and it streamlines the administrative process by removing a layer of judicial review. As the Third

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[6] *Accord, Garland* v. *Director, U.S. Department of Labor*, 713 F.2d 613 (11th Cir. 1983) (affirming district court dismissal of action seeking review of administrative decisions denying benefits under the BLBA for lack of jurisdiction and failure to exhaust administrative remedies); *Appalachian Power Co.* v. *Dunlop*, 399 F. Supp. 972 (S.D. W. Va. 1975) (dismissing employer's suit brought in district court to enjoin Secretary of Labor from finding it an "operator" because employer had failed to exhaust administrative remedies). Other courts, although not confronting directly the exclusivity of the statutory scheme, have noted the broad jurisdictional reach of the Benefits Review Board. See, *e.g.*, *Marshall* v. *Barnes & Tucker Co.*, 432 F. Supp. 935, 937-938 (W.D. Pa. 1977).

Circuit observed in *Compensation Department* (667 F.2d at 342 (footnote omitted)), "if at every point in the administrative process at which a [party] * * * believed that the BLBA was not being followed in some respect, that [party] could file an action in district court for an injuction—rather than raise the alleged violation of the statute on administrative appeal—the resulting duplication of review and the disruption of orderly and uniform administrative interpretation could have an adverse effect on implementation of the BLBA." There is no reason why petitioners could not challenge the Secretary's guideline before the Benefits Review Board in the first appropriate case and then seek direct court of appeals review of any adverse ruling.

To be sure, "exceptional circumstances" may permit a party to bypass an exclusive statutory scheme. *Whitney*, 379 U.S. at 426 n.7; *Compensation Department*, 667 F.2d at 343. These "exceptional circumstances," however, are narrowly construed. "[C]ourts will not make nonstatutory remedies available without a showing of patent violation of agency authority or manifest infringement of substantial rights irremediable by the statutorily-prescribed method of review." *Nader* v. *Volpe*, 466 F.2d 261, 266 (D.C. Cir. 1972) (footnote omitted). See *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). The court of appeals in this case correctly noted that petitioners have failed to show any circumstances that would require an exceptional assumption of jurisdiction by the district court: the statute "does not clearly exclude railroads" (Pet. App. 9a), and "the Secretary has considerable discretion in making initial determinations of BLBA applicability" (*id.* at 11a).[7]

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[7]Although, in our view, the Court should not reach the substantive issue in this case, we also note that petitioners' underlying claim is without merit. First, the BLBA's definition of "operator," which includes "any independent contractor performing services or construction at [a] mine," on its face encompasses railroads. 30 U.S.C. (Supp. V)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1984

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of the BLBA, 30 U.S.C. (Supp. V) 802(d). Moreover, another section ployers other than mine operators, 932(b), explicitly recognizes that en tion of coal, may be liable for the who are engaged in the transporta payment of benefits.

is also sufficiently broad to include

The BLBA's definition of "miner extends coverage to persons who railroad employees; that definition ation. 30 U.S.C (Supp. V) 902(d). have worked in coal mine transpo itions are controlling. Contrary to These unambiguous statutory defi ve history of the BLBA does not petitioners' assertions, the legislat As the court of appeals pointed out support petitioners' interpretation. history cited by petitioners (Pet. (Pet. App. 10a-11a), the legislativn with a Senate bill that was not 20-21) was rendered in conjunctio 4, *supra*, at 15-16. enacted. See H.R. Conf. Rep. 95-8

No. 83-1040

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SEABOARD SYSTEM RAILROAD, INC., *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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April 1984

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REPLY BRIEF OF PETITIONERS

In this case, the petitioner railroads have sought review of a Court of Appeals decision which, in conflict with two prior decisions of this Court,[1] held that the District Courts lack jurisdiction to resolve threshold legal issues arising under the Black Lung Benefits Act, 30 U.S.C. §§ 901-45 ("BLBA"). In reply to the Government's opposition to certiorari, four points deserve emphasis.

1. Despite the Government's attempt to wish the conflict away in a footnote (see Gov. Opp. 6 n.4), the conflict between the Sixth Circuit's decision and this Court's decisions in *Turner Elkhorn* and *NICOA* is quite real. In both *Turner Elkhorn* and *NICOA*, District Courts, later reviewed on the merits by this

[1] *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *NICOA* v. *Brennan*, 419 U.S. 955 (1974).

Court, asserted jurisdiction to decide threshold legal claims under the BLBA.[2] That is exactly what the District Court did in this case—before the Sixth Circuit reversed, holding that the District Court lacked jurisdiction.[3] The Sixth Circuit's holding therefore conflicts with this Court's recognition in *Turner Elkhorn* and *NICOA* that District Courts may entertain such claims, and the Government fails to distinguish *either* case.

First, this Court in *Turner Elkhorn* did *not* pass on the jurisdictional issue *sub silentio*, as the Government implies by its reliance on *Pennhurst State School & Hospital* v. *Halderman*, 104 S. Ct. 900 (1984). To the contrary, in *Turner Elkhorn* this Court explicitly recognized a three-judge District Court's jurisdiction over constitutional challenges to the BLBA, and a single District Judge's jurisdiction over challenges to regulations implementing the statute. See 428 U.S. at 13, 37 n.41.[4] Thus, it cannot be said, as in *Pennhurst*, that the jurisdictional issue is "an open one." 104 S. Ct. at 918. This Court in *Turner Elkhorn* expressly recognized and affirmed District Court jurisdiction to decide threshold claims under the BLBA.[5]

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[2] *Turner Elkhorn Mining Co.* v. *Brennan*, 385 F. Supp. 424 (E.D. Ky. 1974); *NICOA* v. *Brennan*, 372 F. Supp. 16 (D.D.C. 1974).

[3] The Sixth Circuit's opinion is reported at 713 F.2d 1243 and appears as Appendix B to the petition for certiorari, and the District Court opinion appears as Appendix D.

[4] Because of the repeal of 28 U.S.C. § 2282 in 1976, both sets of issues would today be within the jurisdiction of a single District Judge.

[5] The Government also suggests that this Court's review in *Turner Elkhorn* does not confirm the District Court's jurisdiction because this Court "had jurisdiction over the appeal under 28 U.S.C. 1252 regardless of whether the district court properly asserted jurisdiction in the first instance." Gov. Opp. 6 n.4. Under Section 1252, however, the Court had jurisdiction to review the District Court's decision on the *merits* only if the District Court itself had jurisdiction to act; otherwise this Court's jurisdiction would have been limited to vacating the judgment below and remanding with directions to dis-

Second, *NICOA* is not deprived of precedential weight on the jurisdictional issue because it was a summary affirmance. As the Government correctly notes (Gov. Opp. 6 n.4), summary decisions extend to all issues "necessarily decided." The issue of a District Court's jurisdiction is necessarily decided when this Court summarily affirms on the merits, and such actions "obviously are of precedential value." *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). The Government can argue about how much precedential value should be assigned to *NICOA*; but the decision's implicit acknowledgment of District Court jurisdiction to entertain threshold legal claims under the BLBA, and its conflict with the Sixth Circuit on this point, are beyond dispute.

In all events, the assumption of jurisdiction in *Turner Elkhorn* and *NICOA* cannot be squared with the rejection of jurisdiction by the court below. That is precisely the kind of conflict that this Court sits to resolve. At a minimum, litigants and lower courts are entitled to know which set of signposts are to be followed in the future.

2. Wholly apart from the direct conflict of decisions under the BLBA, certiorari to resolve the jurisdictional issue is further justified by several other considerations. The Government, like the Sixth Circuit, conveniently forgets that District Court review of agency determinations of threshold statutory issues is presumptively available. A cause of action supporting such review has been recognized for almost a century and District Court jurisdiction is clearly provided under 28 U.S.C. §§ 1331 and 1337(a). See Pet. 7-8 & nn.14, 15. This Court has stressed that such review "will not be cut off unless there is persuasive reason to believe that such was the purpose of

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miss. See *California* v. *Grace Brethren Church*, 457 U.S. 393, 418-19 (1982); *Williams* v. *Zbaraz*, 448 U.S. 358, 368 (1980). Since this Court did pass upon the merits in *Turner Elkhorn* (and in *NICOA* as well), it recognized District Court jurisdiction to decide threshold legal claims under the BLBA.

Congress." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967).

There is no basis in the BLBA or its legislative history to support the conclusion that Congress meant to preclude District Court review of threshold legal claims. Like the Sixth Circuit, the Government mistakenly assumes that, because Congress explicitly provided an exclusive statutory review procedure for a specified class of agency action (individual benefits determinations), District Court review of a *different* class of agency action (general regulations of the Secretary of Labor) is "implicitly" precluded. See Gov. Opp. 7 & n.5.[6] As this Court said in *Abbott*, "the mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others." 387 U.S. at 141, quoting L. Jaffe, *Judicial Control of Administrative Action* 357 (1965).

Certainly no "tribunal with . . . cumulative experience about arcane regulatory matters" (Gov. Opp. 8) is required to decide the threshold legal question of whether Congress intended railroad employees to be within the BLBA's definition of "miners." Similarly, there is no showing here—as there was in *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965)—that Congress considered and rejected District Court review of such questions. Thus, the relevant Congressional policy is that reflected in the Administrative Procedure Act: a person adversely affected by agency action—here the Secretary of Labor's general misinterpretation of the statute—"is entitled to judicial review thereof." 5 U.S.C. § 702.

The jurisdictional issue in this case is a recurring one and is important to the administration of the BLBA, which governs thousands of present and potential claimants and hundreds of

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[6] No review of an individual benefits determination is involved in this case; petitioners seek a declaration that railroad employees are not included in the definition of "miner" under the BLBA.

millions of dollars in benefits. Through threshold judicial review, a recurring constitutional or statutory interpretation issue can be resolved swiftly by the courts, providing guidance to the Secretary of Labor in subsequent cases.[7] Whether District Court review is available under the BLBA to determine threshold legal questions affecting a large number of claims is an issue that ought to be resolved definitively, even assuming *arguendo* that this Court's prior decisions in *NICOA* and *Turner Elkhorn* did not do so.

3. On the merits, petitioners challenged the Department of Labor regulation that expressly includes railroad employees in BLBA's definition of "miners."[8] The regulation is invalid because Congress explicitly said that the BLBA's definition of "miner" "does not contemplate inclusion of those workers em-

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[7] The Government's suggestion that precluding District Court review will "streamline[ ]" the process (Gov. Opp. 8) is bizarre since it is the Government's resistance to District Court jurisdiction in this case that has created the continuing delay and uncertainty in the interpretation of the statute. Clearly, as this Court recognized in *NICOA* and *Turner Elkhorn*, broad threshold issues, common to a range of potential claims, ought to be subject to judicial review at once. The possibility that there may be some legal issues that do not warrant such treatment is no basis for deferring judicial review where a genuine threshold issue is present. Compare *Compensation Department* v. *Marshall*, 667 F.2d 336 (3d Cir. 1981).

[8] The Government misdescribes the issue by suggesting that petitioners assail the regulation's failure to "exclude" railroad employees from the statute (Gov. Opp. 3), a phrasing that suggests that the Secretary of Labor may not have decided the issue. Quite the contrary, the Secretary of Labor has expressly included railroad employees as "miners" in a series of examples: *e.g.*, "[a] claimant employed by a railroad company to maintain track between the extraction site and tipple," and "[a] claimant who is employed by a railroad company as a conductor on trains which pick up raw, unprocessed coal at a coal mine and carry it to a preparation facility . . . ." Pet. App. 34a.

ployed by a railroad . . . unless such company also operates a mine." S. Rep. No. 95-209, 95th Cong., 1st Sess. 21 (1977).

The Government argues that what the Senate said is immaterial because the Senate bill under discussion "was not enacted." Gov. Opp. 10 n.7. However, the BLBA definition of "miner" was the definition framed by the Senate, and the Conference Committee *adopted* the Senate's language. See Pet. 20 n.31. The fact that the Senate's definition was incorporated into the House bill by the Conference Committee (see *id.*) does not render the Senate's expression of intent any less controlling.

Nothing in the subsequent legislative history suggests any repudiation of the Senate's view, expressed both in the Senate committee report and on the Senate floor by Sen. Randolph, the floor leader for the Senate committee. See Pet. 21 n.32. It is difficult to imagine how Congress could have made any clearer its intent that railroad employees were not to be included in the definition of "miners" under the BLBA. The Secretary of Labor's decision to include such employees under the BLBA despite "the expressed legislative intent to the contrary" (*Consumer Product Safety Comm'n* v. *Sylvania*, 447 U.S. 102, 108 (1980)) is a direct usurpation of power worthy of review by this Court.[9]

4. Contrary to the Government's suggestion (Gov. Opp. 9 n.7), the statutory interpretation issue should be decided by this Court along with the jurisdictional issue. The question whether railroad employees qualify as "miners" under the BLBA, in light of the explicit congressional directive to the contrary, is itself an important and recurring issue in the administration of a major federal program. In *Laing* v. *United*

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[9] Since railroad employees are not miners, the question whether the term "operator" might otherwise embrace railroads need not be reached (compare Gov. Opp. 9 n.7); but in fact, the legislative history shows that the definition of "operator" was not designed to reach railroads but rather to include firms engaged in mine construction or extraction for the benefit of the mine operator. See S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977). See Pet. 22 & n.34.

States, 423 U.S. 161 (1976), this Court, in granting review, took note of the fact that there were 70 pending cases dependent on the resolution of the issue involved. In the present case, it appears that there are already well over 1000 claims for black lung benefits filed by present or former railroad employees against the railroads. See Pet. 6.

In addition, the amount of money involved is enormous. Each individual claim represents a potential liability of about $150,000 so that, even without regard to future claims, claims filed thus far could represent over $150 million in liability. In *Commissioner* v. *Standard Life & Accident Ins. Co.*, 433 U.S. 148 (1977), this Court observed that over $100 million was in dispute. Furthermore, Congress' intended exclusion of railroad employees from BLBA almost certainly reflected the fact that railroad employees are covered by other federal statutes not applicable to ordinary miners. The Secretary of Labor's ruling in this case creates a risk both of double liability for railroads and of double recovery by their employees. See Pet. 21 & n.33

Finally, the statutory issue should be resolved now because it is contrary to every precept of sound judicial administration to defer a decision on the merits. Without a simple yes or no answer to the statutory question presented, hundreds of cases may progress through the administrative process, additional suits will will be pursued through different Courts of Appeals, there will be vast expenditures of time and money in litigation, and the railroads' financial liability will remain uncertain for a period of years. Thus, there is a common thread connecting the jurisdictional and the statutory issues presented in this case: the same concerns that in general warrant District Court jurisdiction to resolve legal threshold issues under the BLBA also specifically support a definitive ruling on the merits of this case by this Court at the earliest possible time.

CONCLUSION

For the foregoing reasons, as well as for those set out in the petition, certiorari should be granted.

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